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.

PETITIONER'S OPENING BRIEF.

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Opinion Below.

The opinion of the Supreme Court of California is reported at 62 Cal. 2d 571 and 400 P. 2d 97.

Jurisdiction.

The California Supreme Court filed its decision on March 25, 1965. (*People v. Stewart,* 62 A.C. 597.) A timely petition for rehearing was denied on April 21st; on the same day the decision was modified. (*People v. Stewart,* 62 A.C. [Minutes], No. 25, p. 1; *People v. Stewart,* 62 A.C. 648.) Pursuant to the 22nd rule of this Court, our time to file a petition for writ

of certiorari was extended by Mr. Justice Goldberg until August 19th, then by Mr. Justice Douglas until September 18th. The case was docketed on September 18th and certiorari was granted on December 6th. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions and Statutes Involved.

This case involves the Sixth Amendment to the United States Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution. Those provisions are reprinted in Appendix A, *infra.*

Questions Presented.

1. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a state criminal trial by reason of the Constitution of the United States solely because the investigating officers did not advise him of his right to consult with counsel and his right to remain silent?

2. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a state criminal trial by reason of the Constitution of the United States because the prosecution did not establish that the defendant at the time of the questioning made a knowing and intelligent waiver of both (a) his right to consult with counsel and (b) his right to remain silent?

3. If so, is such a free and voluntary confession inadmissible where the record does not affirmatively establish that the defendant was not advised of his rights and did not waive them?

Statement of the Case.

In an information filed by the District Attorney of Los Angeles County, Stewart was charged with two counts of kidnaping to commit robbery (Miss Champaine, Mrs. Wells), five counts of robbery (Miss Champaine, Mrs. Wells, Mrs. Miyauchi, Mrs. Dixon, Miss Ramirez), one count of rape (Miss Champaine) and one count of murder (Miss Mitchell). [Clk. Tr. pp. 1-9.] It was also alleged that Stewart had suffered prior convictions of robbery and possessing narcotics. [Clk. Tr. p. 10.]

Stewart pleaded not guilty and denied, then admitted the priors. [Clk. Tr. pp. 11, 14.] In a jury trial, he was found guilty of murdering Miss Mitchell and guilty of robbing Mrs. Wells, Mrs. Miyauchi, Mrs. Dixon and Miss Ramirez, the jury finding both the murder and the robberies to be of the first degree. He was found not guilty of kidnaping Mrs. Wells and not guilty of raping, robbing and kidnaping Miss Champaine. [Clk. Tr. pp. 27-28.]

California law provides for bifurcated trials in capital cases. (Cal. Penal Code, Sec. 190.1) At the conclusion of a separate penalty trial, the same jury decided that Stewart should suffer death, and following denial of a new trial motion he was sentenced to death on the murder count and to state prison on the robbery counts. [Clk. Tr. pp. 40-42.] Upon his automatic appeal to the California Supreme Court (See Cal. Penal Code, Sec. 1239b) the judgment was reversed both as to the murder count and as to the four counts of robbery. (*People v. Stewart,* 62 Cal. 2d 571, 400 P. 2d 97.) On December 10, 1965, our application for a stay

of execution was granted pending final determination of this proceeding. (*People v. Stewart,* 63 A.C. [Minutes], No. 22, p. 5.)

The People's Evidence.

Meriwether Wells.

Meriwether Wells lived with her husband at 1942 West 41st Drive in Los Angeles; both were employed by Goodwill Industries. [Rep. Tr. pp. 365-366.] Mrs. Wells left work at 5 p.m. on December 21, 1962, shopped, took a bus, then walked from the bus stop at Gramercy Place and Santa Barbara toward her home, carrying her purse containing $5 to $10 and a black alligator wallet bearing her maiden name, Meriwether Audrey Knapp. Her purse also contained charga-plates from the Broadway Department Store and Bullock's in the names of Mr. and Mrs. Robert K. Wells. [Rep. Tr. pp. 367-373.] It likewise contained two pay checks from the Goodwill Industries, one payable to her and the other to her husband, and three dividend checks which her husband had given her that morning. [Rep. Tr. pp. 374-375.]

As Mrs. Wells was walking south on Gramercy Place, she reached an alley located between 41st Street and 41st Drive. After she traversed the alley and as she stepped up onto the curb, she was struck from behind on the left rear side of the head. Mrs. Wells fell on her back, looked up and saw a colored man who began hitting her on the right side of the jaw. She became unconscious and regained consciousness four

days later at the hospital. Mrs. Wells spent three weeks in the hospital, suffering from a fractured jaw and also from difficulty in hearing.[1] [Rep. Tr. pp. 376-384.] When asked whether Stewart was the man who attacked her, she replied: "I don't know." [Rep. Tr. pp. 394, 397-398.] Mrs. Wells identified her purse, her wallet, one of her charga-plates, two of the dividend checks, and a photostatic copy of the other dividend check. She testified that she did not give anyone permission to take them or to move her into the alley and that she did not see any of the foregoing items for about seven weeks after December 21st. [Rep. Tr. pp. 389-394.]

MacDonald M. Simmons lived at 1906 West 41st Street. At about 6:55 p.m. on December 21st, Simmons heard his dog bark and heard a groaning noise. He went to the front of his house, then to the rear, then obtained a flashlight and shined it into the alley behind his house. Mrs. Wells was in the alley, blood on her face and head; she said "Help" several times and Simmons told his wife to call the police, remaining with her until after they arrived. [Rep. Tr. pp. 408-413.]

Official Marvin L. Cooper came to the scene at about 7 p.m., together with his partner, Officer Phillips. Mrs. Wells was bleeding profusely and unable to speak. [Rep. Tr. pp. 417-418.] Sergeant M. T. McMil-

[1]Mrs. Wells' testimony as to the nature of her injuries was confirmed by Dr. Reid, the examining physician, who testified that she was in critical condition upon being admitted to the hospital. [Rep. Tr. pp. 441-446.]

lan arrived a few minutes later, observing blood smears on the south curb of the alley and drag marks from 8 inches to 2 feet in width extending 38 feet from the smears into the alley to a place where there were more blood smears and some radial marks caused by an object twisting so as to form the arc of a circle. [Rep. Tr. pp. 451-454, 457-459.] McMillan had a conversation with Simmons in which the latter indicated that he found Mrs. Wells at the end of the drag marks. [Rep. Tr. pp. 590-591.] He had a later conversation with her husband in which Mr. Wells mentioned the dividend checks. [Rep. Tr. pp. 455-456.]

The charga-plate identified by Mrs. Wells was found by a teen-aged girl, Nelva Christmas, in some grass near 39th Place and Wilkins [*sic*] shortly after Christmas. Nelva turned it over to the police. [Rep. Tr. pp. 429-431.] The other items identified by Mrs. Wells were traced to Stewart through testimony to be related in part at this point and in part on a subsequent page.

At the time of trial, the dividend checks bore the endorsement of one Lena Franklin, an inked notation "M-51818" and the endorsement "Robert K. Wells." Mr. Wells testified that he did not endorse the checks, that he did not give anyone permission to endorse his name to them, and that the inked notation was not on the checks when he gave them to his wife on December 21st. [Rep. Tr. pp. 419-423.]

Sam Newman operated a market at 3793 South Arlington. Shortly before Christmas, Stewart came to Newman's office and asked him to cash three checks, two of them out-of-state checks. Newman asked Stewart for his driver's license, Stewart said he had none, then Newman told him that someone with a driver's

license would have to co-sign the checks and the latter replied that Lena Franklin, a regular customer of Newman's, was in the store and would do so. [Rep. Tr. pp. 462-465.] Mrs. Franklin showed Newman her driver's license; Newman wrote her license number "M-51818" on the checks; appellant endorsed them, then Mrs. Franklin endorsed them. [Rep. Tr. pp. 466-468.] Stewart signed the name "Robert K. Wells" and wrote the address "1942 West 41st Drive" on the checks. [Rep. Tr. p. 470.] In late January, Newman had a conversation with an officer named Logue about the persons who endorsed and passed the checks. [Rep. Tr. p. 471.]

Lena Franklin had met Stewart on December 13th and was formally introduced to him on December 22nd by her brother-in-law, Herschel Duerson, who told her that his name was Roy Wells.[2] They went to the Duerson's house on Normandie, then to two drug stores and to a market where Stewart said he had some checks he wanted to cash, one of which he succeeded in cashing. [Rep. Tr. pp. 475-479.] Then they went to Newman's Market. There Stewart asked the cashier to cash some checks and was told to see Newman in his office. Summoned by Newman, Mrs. Franklin exhibited her driver's license; Newman wrote her license number on the three Wells dividend checks; Stewart endorsed the checks, then she did; Stewart signed the name "Robert Wells," and when she told him that she thought his name was Roy, he said that he was called "Roy" for short. [Rep. Tr. pp. 480-486.] Then the checks were taken to the cashier and cashed. [Rep. Tr. p. 487.]

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[2]She was also introduced to a woman named Lil, described to her as Stewart's wife. [Rep. Tr. p. 493.]

On January 30th, Mrs. Franklin had a conversation with Officer Logue about the checks and the identity of the man who endorsed and cashed them. That evening[3] she drove around with Logue and some other officers looking for Stewart's house. She recognized a house on 39th Street, saw Stewart standing on the porch, and identified him to the officers as the man who had signed and cashed the checks. [Rep. Tr. pp. 489-491, 502.]

Tsuru Miyauchi.

Mrs. Tsuru Miyauchi lived with her husband and daughter at 3935½ Montclair. Testifying with the aid of an interpreter, she stated that about 6:15 a.m., on January 10, 1963, she started to walk to the bus stop to go to work. She was carrying a leather lunch bag, containing a red change purse, some pictures, some keys and $9 or $10 in cash. [Rep. Tr. pp. 505-508.] When Mrs. Miyauchi reached the intersection of 10th Avenue and 30th Street, she saw someone coming down 30th Street and heard heavy footsteps behind her as she walked down 10th Avenue. She remembered collapsing on the ground. When she awoke an hour later, blood was coming from her head, right eye, nose and mouth; she had lost two teeth; her lunch bag was missing. [Rep. Tr. pp. 508-511.] She returned home and her daughter, who spoke English, called the police. [Rep. Tr. pp. 511-512.] Mrs. Miyauchi identified her purse, testifying that she had not given permission to Stewart or to anyone else to take it. [Rep. Tr. pp. 512-516.] Her condition on the morning of January 10th was confirmed by Officer Vanover, one of the investigating officers, who observed that her eyes were

[3]As will be shown hereinafter, Mrs. Franklin was mistaken about the date.

swollen shut and her hair was matted with blood. [Rep. Tr. p. 520.] She was taken to the hospital, where she remained for 10 days. [Rep. Tr. pp. 517-518.] According to Dr. Charles Carton, the examining physician, she had a broken nose and a depressed fracture of the skull. The skull fracture was caused by a blow from a blunt instrument. [Rep. Tr. pp. 585-588.]

Lucille O. Mitchell.

Mary Louise Mitchell Thomas was the niece of Lucille O. Mitchell, aged 66. Mrs. Thomas last saw her aunt at about 2 p.m., on January 19, 1963; Miss Mitchell was then wearing glasses. Mrs. Thomas identified a pair of glasses, a silver cuff link, a black leather case, an ear plug for a transistor radio, a lady's watch and a Bullock's charga-plate as belonging to her aunt; Miss Mitchell wore the watch on her left wrist. [Rep. Tr. pp. 596-601.]

George Logan lived at 2021 West 35th Place. At about 7 p.m., on January 19th, Logan and his wife drove home, alighted from their car, and heard a groaning noise. On the steps of the porch Logan discovered a Negro lady lying on her back, blood about her head and face, and he summoned the police. [Rep. Tr. pp. 604-609.] Officer R. R. Plante, called to the scene, tried to talk to Miss Mitchell but she was moaning and incoherent. [Rep. Tr. pp. 612-613.] He searched the area and about 100 feet from the Logan residence he found her eyeglasses (which were broken) by a pool of blood on the sidewalk in front of 3560 South Cimarron. In the parkway in front of 1921 West 36th Street Plante also found a receipt bearing Miss Mitchell's name. [Rep. Tr. pp. 615-619.]

Miss Mitchell died in the hospital at 11:45 a.m. on January 20th. [Rep. Tr. p. 620.] An autopsy was per-

formed the following day by T. Noguchi, a coroner's autopsy surgeon. [Rep. Tr. p. 623.] In Noguchi's opinion, Miss Mitchell died of a cortical contusion of the brain and a subdural hematoma with fracture; her death was unnatural. [Rep. Tr. pp. 631-632.] He found five bruises on Miss Mitchell's left arm which could have been caused by fingers gripping. [Rep. Tr. pp. 633, 658.] On the temporal area on the left side of Miss Mitchell's head were five recent crescent-shaped lacerations covering an area measuring about 1½ inches. Noguchi gave his opinion that the lacerations were caused by a hard object with a curved contact surface; the object could have been a shoe. There were seven recent scratches on her right cheek and her right ear had been torn and bruised. [Rep. Tr. pp. 649-656.] There was also a crescent-shaped laceration on the right ear; the laceration was due to blunt force and could have been caused by a shoe. [Rep. Tr. pp. 656-657.] Dr. Noguchi described Miss Mitchell's fracture as a basal skull fracture extending from the right temporal area to the left. [Rep. Tr. pp. 663-664.] In his opinion, her injuries could not have been caused by a single fall. [Rep. Tr. p. 668.] Although there were multiple blows to the head, the ear injury and resulting fracture were fatal. [Rep. Tr. pp. 666-667, 671.]

Beatrice Dixon.

Shortly after 6 p.m. on January 25, 1963, Beatrice Dixon was walking home along Gramercy Place toward 39th Street, carrying a large leather bag containing a billfold, a black coin purse containing $23, and a door key on a chain bearing her initial "B". Mrs. Dixon identified the purse and key at the trial. [Rep. Tr. pp. 525-527.]

As Mrs. Dixon proceeded along Gramercy, she was struck on the left side of the head, then "woke up in the alley with a hole in my head." Her mouth and lips were bleeding and some teeth had apparently been loosened; her purse was also missing, and she had given no one permission to take it. Mrs. Dixon was taken to the hospital, where she remained for one day. [Rep. Tr. pp. 528-532.] She was unaware that Stewart lived about a block away from her house and had never seen him before. [Rep. Tr. p. 532.]

Mrs. Dixon's condition on January 25th was confirmed by Officer Pierre Berleaud, who was summoned to her home and observed her bleeding profusely from the mouth and from a large gash on the left side of her head. [Rep. Tr. pp. 534-535.] Berleaud made a search of the area where Mrs. Dixon said the incident occurred. He discovered a large pool of blood and drag marks leading into an alley at 3881 South Gramercy Place, then found another pool of blood. He found none of her belongings. [Rep. Tr. pp. 536-537.]

Maria Louisa Ramirez.

At approximately 6:40 a.m. on January 30, 1963, Miss Maria Ramirez was walking along Gramercy Place near 38th Place, intending to get her car to go to work. She was carrying her lunch bag and a black patent leather purse containing a wallet with $2 in it and a pair of glasses in a case; these items she identified at the trial. [Rep. Tr. pp. 551-553, 556-557.]

As Miss Ramirez proceeded down the street, she heard footsteps behind her. Then someone hit her on the rear of the right side of the head and she fainted. When she regained consciousness, she was bleeding and

her purse was gone. [Rep. Tr. pp. 553-555.] She was unable to identify Stewart as her assailant but testified that she gave no one permission to take her purse or its contents. She was taken to the hospital where she remained nine days. [Rep. Tr. pp. 557-558.] There she was examined by Dr. Reid, who concluded that her equilibrium had been disturbed by a traumatic injury to the head. [Rep. Tr. pp. 447-450.]

Mrs. Nellie Lattimore lived at 3846½ South Gramercy Place. At approximately 6:40 a.m. on January 30th, Mrs. Lattimore was looking out her second-story bedroom window. She saw a woman walking north on Gramercy Place, carrying a black purse, and a colored man walking behind her at the same rate of speed. [Rep. Tr. pp. 560-563.] Near the corner of 38th Place and Gramercy Place, the man increased his speed. Mrs. Lattimore heard a noise "like some kind of running" and then she saw the man running. Just before she saw him run, her view was blocked by a tree and as he ran, he was carrying a black purse. [Rep. Tr. pp. 563-567.] Mrs. Lattimore ran from her house and discovered Miss Ramirez lying under some bushes, bleeding from the right side of the head; she returned home and called the police. [Rep. Tr. pp. 568-570.] Officer Mark Ford, called to the scene, searched the area and found none of her belongings. [Rep. Tr. pp. 578-580.]

Mrs. Lattimore was asked whether the running man was in court, replied "I think so," and pointed to Stewart. [Rep. Tr. p. 570.] Then she said that she was not sure he was the man. [Rep. Tr. p. 572.] When asked why she thought he was the man, she said that he seemed to be wearing the same clothes and looked like him. [Rep. Tr. pp. 576-577.]

The Arrest, the Searches and the Interrogations.

Sergeant A. H. Logue has already been mentioned as one of the officers in the case. Logue testified that Nelva Christmas showed him where she found Mrs. Wells' charga-plate on December 27th. [Rep. Tr. pp. 681-682.] On the 30th, he had also investigated the Ramirez robbery and he found Miss Mitchell's charga-plate on the ground about 18 inches from the place where Miss Ramirez' body had been lying. [Rep. Tr. pp. 687-688.] He had two conversations with Mr. Wells, one on December 22nd, the other on January 30th. During the latter conversation, Wells gave him photostatic copies of the three dividend checks, Logue showed the photographs to Newman and after talking to Newman he attempted to locate Lena Franklin, whom he succeeded in contacting the following day, January 31st. [Rep. Tr. pp. 683-686.]

Officer Logue drove with Mrs. Franklin and several other officers to locate the home of the man who had cashed the Wells checks. As they approached the premises at 1912 West 39th Street, Logue saw Stewart standing on the front porch; he talked to Lena Franklin, then stopped the car. Logue walked toward the house, Stewart turned and entered it, then Logue and another officer followed him inside, down a hallway and into the entrance of a bedroom, where Logue identified himself and arrested him for robbery. [Rep. Tr. pp. 690-693, 696-698.] The arrest occurred at about 7:15 p.m. Logue told Stewart that he was being arrested for a series of purse-snatch robberies and asked him if he "might look around the house." Respondent said, "Go ahead." [Rep. Tr. p. 698.]

The premises consisted of a single-story duplex containing a living room-dining room combination, a kitchen, a bedroom, a bath, a service porch and a hallway. Mrs. Wells' purse was found on an upper shelf in the bedroom closet along with some men's and women's clothing. Her wallet was found in a bureau drawer in the hallway along with some men's clothing. Mrs. Miyauchi's coin purse, with a key attached, was found in a bureau drawer in the bedroom, together with Miss Mitchell's watch; in the same drawer were women's clothing, jewelry, letters and items of identification in Stewart's name and in the name of Lillian Lara; the key attached to Mrs. Miyauchi's purse opened the front door. [Rep. Tr. pp. 699-703.] Mrs. Dixon's coin purse and initialed key were found in the same bureau drawer as Mrs. Wells' wallet. [Rep. Tr. pp. 703-704.] Miss Ramirez' wallet was discovered in the same bureau drawer and her purse was found under a pile of men's clothing on the back porch. [Rep. Tr. pp. 704-705.] At about 1 p.m. on February 3rd, Officer Logue returned to the premises with Lillian Lara and several other officers. Miss Ramirez' glasses were found in the dining room cupboard and Miss Mitchell's cuff link, case and transistor ear plug were discovered on top of a television set in the living room. [Rep. Tr. pp. 705-708.]

Sergeant Logue testified to a number of conversations with Stewart occurring on January 31st, February 1st, February 3rd, February 4th and February 5th at the University Police Station. Stewart spoke freely and voluntarily. [Rep. Tr. pp. 710-712.]

The first conversation occurred around 10 p.m. on January 31st and lasted about twenty minutes. Ser-

geant Mangiameli, Logue's partner, was also present. The officers had in their possession the items already discovered in Stewart's house. Stewart was shown photographs of the Wells dividend checks and asked if he had ever seen them before; he denied having seen them. He was then asked if he had ever used the name Wells or signed Wells' name to the checks; this he also denied. He was next asked if he knew Lena Franklin and he said he did not. He was asked if he knew where Newman's Market was and he said that he did. When asked whether he had endorsed and cashed the checks at Newman's Market, he said he had not. [Rep. Tr. pp. 712-713, 716-718.]

Two conversations occurred on February 1st, both in the presence of a Sergeant Jensen. The first began around 11 a.m. and lasted about twenty minutes. Stewart was asked the same questions he had been asked the previous night and returned the same answers; however, he voluntarily gave the officers an exemplar of his handwriting. The second conversation occurred at about 3 p.m. and lasted for five or six minutes. The officers told Stewart that his handwriting had been compared with the endorsement on the checks and that in the opinion of the handwriting expert he had signed them, but Stewart again denied having signed Wells' name to the checks. He asked to speak to Lillian Lara and told the officers he might have something to tell them after speaking to her. [Rep. Tr. pp. 718-720.]

The next conversation occurred at about 11 a.m. on February 3rd. It lasted five minutes and Mangiameli was again present. Stewart repeated his request to talk to Lillian Lara and reiterated that after he talked to her he might have something to say. The officers

agreed to let him talk to her and following his conversation with Lillian, they spoke to him again for about five minutes. Stewart admitted having signed Wells' name to the checks and having cashed them. Upon being asked where he had got the checks, Stewart said he had found them at the base of a tree at 37th and Western, but upon being shown Mrs. Wells' purse and wallet, he denied having seen them before. [Rep. Tr. pp. 720-722.]

The following day, February 4th, Logue and Mangiameli had a half-hour conversation with Stewart, beginning just before noon. Stewart was shown Miss Ramirez' purse, glasses and wallet, Mrs. Dixon's purse, Mrs. Miyauchi's coin purse, Miss Mitchell's watch, ear plug and cuff link, and he denied ever having seen any of them. He was again shown Mrs. Wells' purse and wallet and although he denied having seen the wallet, he said that the purse was one he had brought with him when he moved into the duplex about two months previously and had placed on the top shelf of the bedroom closet. He was asked his whereabouts on the evening of January 19th, and replied that he was home all night with his brother. [Rep. Tr. pp. 722-725.]

During a one-hour conversation on the afternoon of February 4th, Stewart was again shown Miss Ramirez' purse. He told Logue and Mangiameli that he had seen it on his back porch and that someone had brought it there. When asked if he had ever seen Miss Mitchell's watch, he said at first that someone had brought it to the house and then he said he bought it on the street as a present for Lillian Lara. He again denied having seen Miss Ramirez' wallet but he said he had found Mrs. Miyauchi's coin purse on the street and had given it to Lillian. [Rep. Tr. pp. 725-726.]

At about 8:30 a.m. on February 5th, Logue and Mangiameli had a twenty-minute conversation with Stewart, most of it recorded on tape. [Rep. Tr. pp. 727-728.] Just before Logue left the room to turn on the recording equipment, Stewart admitted having caused Miss Mitchell's death. [Rep. Tr. pp. 732-733.]

A transcript of the recording was read to the jury. The officers first showed Stewart photographs of the scene at 3560 Cimarron and in response to their questions, he said that he ran up behind Miss Mitchell as she was walking past some birch trees. He snatched a purse which she was carrying on her right arm but did not grab her arm. When asked whether he hit her on the head, he denied having done so, but he said that he could have kicked her in the head after she fell and while he was running although he was not sure. [Rep. Tr. pp. 735-737.] He remembered that she struck the sidewalk as she fell and he said again that he could have kicked her but was sure that he did not hit her. He went home and gave her watch to Lillian later that evening. [Rep. Tr. pp. 737-739.]

When asked what he did with Miss Mitchell's cuff links and ear plug, he said he put them on the television set. [Rep. Tr. p. 739.] He then denied having robbed Mrs. Wells, and when shown Mrs. Miyauchi's coin purse, he said he did not steal it. He also denied having robbed Miss Ramirez and explained that he threw Miss Mitchell's charga-plate away. [Rep. Tr. pp. 739-743.] He denied owning a black jacket, then admitted having intended to snatch Miss Mitchell's purse. He said that he turned the corner and just started walking behind her. As he approached her he began running and took the purse, which was on her right

arm. He could not recall what he did with the purse and when asked again whether he kicked her, he replied that he "may have." [Rep. Tr. pp. 743-745.]

On cross-examination, Logue testified that Lillian Lara was living with Stewart and was arrested at the same time. [Rep. Tr. pp. 747-748, 750.] Logue found on the premises a document purporting to be a proxy marriage certificate but while Stewart was in custody he never used the word "wife" in referring to Lillian; he referred to her by her first name or by both names and he did not tell the officers he was concerned about her because she was pregnant. Logue denied having told him to confess so that his wife could be released, but he admitted that she was in custody until 5 or 6 p.m. on February 5th. [Rep. Tr. pp. 746, 751-753.] He explained that Lillian had been booked for robbery because Miss Mitchell's watch and Mrs. Miyauchi's purse were in her "constructive possession," but he denied telling Stewart that when he explained her possession of those items she could be released. [Rep. Tr. pp. 753-754, 788.]

Amplifying his testimony about the conversations on February 4th, Logue said that when he first told Stewart the dividend checks had been in Mrs. Wells' purse, Stewart said that he brought the purse with him when he moved in and put it in the closet. [Rep. Tr. p. 762.] He denied that Stewart ever told him Lillian Lara had so many purses he did not know one from the other. When asked whether Stewart was anxious to secure her release, Logue said that he seemed to give it little thought. [Rep. Tr. pp. 766-767.] Further amplifying his testimony, Logue said he told Stewart that Lillain had claimed he gave her Mrs. Miyauchi's coin purse,

and Stewart replied that he had never seen it before. Later, after Logue told Stewart the purse had been stolen and showed him Mrs. Miyauchi's name in gold letters on the front of it, Stewart said he had found it on the street. [Rep. Tr. pp. 769-771.] The officer again denied having told Stewart on February 4th that when he learned how Lillian got possession of Mrs. Miyauchi's purse the charge against her would be dismissed, and he also denied having told Stewart that her possession of the purse made it look bad for her. [Rep. Tr. pp. 771-772.]

Sergeant Logue testified further that Mrs. Dixon's purse was found underneath some dirty shirts. When asked on February 4th how the purse came to be in the house, Stewart gave him no explanation, saying merely that people came and went; when asked who they were, Stewart said he could not remember. [Rep. Tr. pp. 775-776.] Logue was asked whether he had ever heard the name Louis Bookman and said he had not. [Rep. Tr. p. 779.] He denied telling Stewart on Febrauary 5th what he was to confess to in return for Lillian's release. [Rep. Tr. p. 783.]

On redirect examination, Sergeant Logue described the conversation preceding the one recorded on tape on February 5th. Logue told Stewart that he had "killed that old woman over on Cimarron Street and you are not even sorry," but Stewart did not reply. Logue repeated his statement and after a few moments Stewart said, "Yes, I'm sorry. I'm sorry I killed her. I didn't mean to kill her." Stewart then said he had run up behind her and grabbed her purse; she fell down and he kicked her but did not hit her; he went home and gave Lillian the watch. Logue then told Stewart that

he would feel better now that he was telling the truth, left, returned, turned on the tape recorder, then the tape recorded conversation began. [Rep. Tr. pp. 788-790.] Logue denied that Stewart's face was swollen while he was incarcerated at the station. He said that Stewart was in a cell by himself, that no force was used on him, and that he suffered no injury. [Rep. Tr. p. 791.]

The Defense.

Linda M. Lara, aged 14, and the daughter of Lillian Lara, described Stewart as her stepfather. She first met Stewart in November 1962 when they were living at 1912 West 39th Street. According to Linda, a Jackie Jackson, a Slim Evans and a Louis Bookman came to the house on a number of occasions in December and January, although there was never an occasion in January when they were all there together. [Rep. Tr. pp. 792-794.] Linda was shown Miss Mitchell's charga-plate and said that she came home from school one day when Jackie Jackson and Louis Bookman were present and saw it on Lillian's dresser in the bedroom. She returned to the living room, then Jackie went into the bedroom, came back, asked her to look up the Bullock's telephone number, and when Linda asked Jackie which one, Jackie replied "Any one except the one downtown." Linda looked up the number of Bullock's on Wilshire Boulevard, gave Jackie the number, Jackie went back into the bedroom, got the charga-plate and left. [Rep. Tr. pp. 795-796.] Linda denied having seen Miss Ramirez' purse at the house. [Rep. Tr. p. 797.] On cross-examination, she was asked when it was that she saw the charga-plate and replied that it was "maybe" the middle of January. [Rep. Tr.

p. 798.] On that date she had seen Bookman and Jackie with some cardboard boxes containing a new black trench coat, a sweater and some shirts. [Rep. Tr. pp. 800-802.]

Stewart took the stand in his own behalf. He denied having robbed and kidnaped Mrs. Wells but he admitted signing Wells' name to the dividend checks and cashing them in the presence of Lena Franklin, whom he had known for over two years and whom he had met through her brother-in-law, Herschel Duerson. He obtained the checks from Jackie Jackson, who asked him if he knew where to get some checks cashed; he had previously cashed checks for her without any difficulty. [Rep. Tr. pp. 817-820.] He also testified that Lillian had many purses. Stewart was shown Mrs. Wells' purse and said that he first saw it at the police station on January 31st. He said that he never denied to the officers having cashed the dividend checks. When asked whether he took Miss Mitchell's purse, he said he did not and when asked whether he had anything to do with her injuries, he returned the same answer. [Rep. Tr. pp. 820-822; Rep. Tr. of November 19, 1963, pp. 26, 30.]

Stewart was asked whether he had admitted his guilt of the Mitchell robbery and murder to Sergeant Logue and he explained that he had several conversations with the officer, that each time he asked Logue about his wife and Logue told him that she was sick, not eating and throwing up, and that when the officer asked him about the murder, he said he knew nothing about it. When Stewart asked Logue when she was going to be released, the latter said he was not going to release her and that he would keep everything le-

gal and "book you for murder beef." Stewart told Logue that there was no sense booking her for murder and Logue replied that he was going to "turn everyone else loose" and only hold him and Lillian. Stewart asked to talk to her and when permitted to do so, he told her he was going to confess to the Mitchell murder so that she could be released since the officer "won't cut you loose until I confess to the murder beef." Lillian told him not to confess but he told her he would because he was not going to see her go to county jail as she was "in the family way." [Rep. Tr. pp. 823-824.] Before giving his confession, he knew none of the details of the killing and Logue told him how and where it had occurred. [Rep. Tr. pp. 824-825.] Stewart testified that he bought Miss Mitchell's watch from Bookman and Jackie Jackson but he knew nothing about her credit card and her other possessions. Logue told him there was no point in "denying these things" since he would be convicted anyway because of his prior record. [Rep. Tr. pp. 825-826.]

On cross-examination, Stewart admitted having been convicted of possessing narcotics in 1953 and having been convicted of robbery in 1957. [Rep. Tr. pp. 827-828.] He did not ask Jackie Jackson where she obtained the Wells checks. [Rep. Tr. p. 832.] He denied having told Logue and Mangiameli on the evening of January 31st that he had never seen them and denied having made the same statement to Logue and Jensen during their conversations on February 1st. Nor did he tell Logue that if he could speak to Lillian he might say something about them. [Rep. Tr. pp. 833-834.] Although he spoke to Lillian on February 3rd, he denied having told Logue and Mangiameli after talking

to her that he found the checks by a tree at 37th and Western, and he denied having said at that time that they were not in a purse and denied having said then that he signed and cashed them. [Rep. Tr. p. 835.]

Upon being shown Mrs. Wells' purse, Stewart said that he had a purse similar to it when he moved into 1912 West 39th Street; a friend of his moved the purse for him. [Rep. Tr. pp. 836-837.] He denied, however, that the Wells purse was the one Logue had shown him at the police station and which he then admitted having brought to the duplex. [Rep. Tr. pp. 838-840.] He also denied having seen Mrs. Wells' wallet at his house and said that he first saw Miss Mitchell's watch at about 9 p.m. on January 19th, when Jackie Jackson and Louis Bookman came to the house. Bookman asked him if he wanted to buy a watch, and he paid Bookman $15 for it. He denied having told the officers that he never saw the watch; he told them that someone had brought the watch to his home; he never told them that he bought it on the street or that he got it from Miss Mitchell; he admitted not having told them the name of the person who brought the watch to his house. [Rep. Tr. pp. 840-844.]

Stewart testified further that Logue first mentioned Lillian was sick in a conversation on February 2nd or 3rd, when no other officer was present. [Rep. Tr. pp. 849-850.] They were married by proxy in Mexico in October 1962. [Rep. Tr. pp. 852-853.] When he talked to Lillian on February 3rd, she was emotionally upset but not physically ill. [Rep. Tr. pp. 853-854.] Logue told him she was sick during their conversations on the 3rd and 4th, and said that if he would tell them about

"the murder beef" she would be "cut loose"; he did not then know what murder the officer was talking about. [Rep. Tr. pp. 855-857.] On February 4th, Stewart asked Logue if he could talk to Lillian and said that when he talked to her he might have something he wanted to tell him, but when asked by the district attorney what he had in mind, he said that he would "rather not answer that" and when directed to reply, he refused to answer. [Rep. Tr. pp. 858-859.]

According to Stewart, Logue took him to the interrogation room on the morning of February 5th. Before Mangiameli arrived, Logue asked him when he was "going to cut Lillian loose" and he said the he did not have a key to the jail. Logue then repeated that Lillian was sick, suggesting that she should not "take a rap" for something he did; Stewart said, "I don't know nothing." [Rep. Tr. pp. 862-865.] When Mangiameli arrived, Logue asked him if he was going to confess and when he said he would not, Mangiameli said that he might as well "cop out to it" because Logue "got you good." Stewart asked Logue how Lillian was doing and Logue said that she was sick. He was taken to his cell, then returned to the interrogation room where he talked to Lillian, who was upset but not physically ill. He was again taken to his cell, then returned again to the interrogation room. [Rep. Tr. pp. 865-871.] There he asked Logue if Lillian was to be released and the latter said that she would be released as soon as he told them what they wanted to know. Stewart asked Logue what he wanted to know, Logue mentioned "the murder beef," and appellant said, "Yeah, I done it." [Rep. Tr. pp. 872-873.]

Upon further cross-examination, Stewart admitted seeing Miss Mitchell's transistor ear plug on his couch around January 26th but he did not know how it came to be there; he denied having seen her cuff link. However, he admitted seeing her charga-plate in the possession of Jackie Jackson around January 22nd; Jackie did not tell him where she had obtained it; he next saw it when it was exhibited to him at the police station. [Rep. Tr. pp. 877-879.] He concluded his testimony by stating that the only reason he told the officers that he took Miss Mitchell's purse, knocked her down and kicked her was to obtain Lillian's release. [Rep. Tr. pp. 880-881.]

Sylvester Creal, called as a defense witness, testified that he took Stewart's belongings to Lillian's house when the latter moved there. Among the things Creal moved was a purse, but upon being shown Mrs. Wells' purse, he said it was not the one he carried to Lillian's. [Rep. Tr. pp. 934-935.]

Jackie Jackson, Stewart's niece, was known as Dolores Watson, Mary Jean Terry, Dolores Whitmore and Gloria Jean Whitmore. She was 24 years of age and in county jail at the time of trial. [Rep. Tr. pp. 882-883.] Jackie had known Stewart since her early childhood and had known Louis Bookman for about three years; she was "pretty tight" with him. When asked what Bookman did for a living, she said: "snatching purses and knocking peoples in the head," an occupation in which she assisted him. [Rep. Tr. pp. 884-885.]

Jackie testified that she had seen both Mrs. Wells' charga-plate and Miss Mitchell's charga-plate in Bookman's possession; they used the Mitchell charga-plate

at Bullock's and left some of the "stuff" they obtained at Stewart's house; in December or January, she saw Bookman with the Wells charga-plate. [Rep. Tr. pp. 885-887.] She testified further that she saw Bookman with Miss Mitchell's watch. She was present when Bookman sold it to Stewart and she loaned Stewart $5 to apply on the purchase price. [Rep. Tr. pp. 887-888.] Jackie was at Stewart's house practically every day, entering without a key; she had "a way to get in." She left a number of purses Bookman had given her on the back porch. Shown the three Wells dividend checks, she said that she bought them from Bookman for $10 and had Stewart cash them for her. [Rep. Tr. pp. 888-889.]

On cross-examination, Jackie testified that she gave Stewart $20 or $25 in return for cashing the checks. When asked when the incident occurred, she said she thought it was in December. [Rep. Tr. p. 891.] When asked when she first saw the Wells charga-plate, she said it was in December, and when asked when she first saw the Mitchell charga-plate, she said it was approximately the first week in January. Upon being asked when she first saw the Mitchell watch, she said she first saw it in a box in Bookman's car in the latter part of December. Then she said that she saw it on a Wednesday night before Christmas in December when Bookman first obtained it. At that time she was driving with Bookman and Slim Evans, Bookman told her to wait near 36th and Western, he left the car, and when she next saw him he had the watch; it was not then in a box. [Rep. Tr. pp. 894-899.] She last saw Bookman during the first week in January on 95th and Avalon. Then she said she last saw him during the

first week in February and said she obtained the watch about two and one-half or three weeks before the February date. [Rep. Tr. pp. 901-903.]

When asked how long she had helped Bookman snatch purses and hit people on the head, she first said "approximately three to four-and-a-half, five hours, sometimes longer," then said she had been with him for three years; she drove a car for him. She testified next that she, Bookman and Slim Evans drove to 35th and Cimarron at about 7 p.m. on January 19th, they parked the car, she knocked on the door of a white house and Bookman and Evans rushed in. An old colored lady came to the door. When asked to describe her, Jackie replied: "I don't remember because I fell the same time she fell." She explained that the lady came out the door, got on the sidewalk and she accompanied the lady, talking to her for about five minutes about "some soaps" that she was selling, then something hit the lady and they both fell. When Jackie got up, Evans and Bookman were standing over them and she returned to the car. [Rep. Tr. pp. 903-910.] After returning to the car, she saw Bookman and Evans coming back from Western down 35th and she picked them up; it was then that she first saw the watch. [Rep. Tr. p. 912.] At the same time, she saw the charga-plate, two cuff links, and a transistor radio. [Rep. Tr. pp. 913-914.]

Jackie was asked whether she used names other than those she mentioned on direct and she admitted having used six others because of her parole. [Rep. Tr. pp. 916-918.] She described Bookman as a dark-skinned Negro, approximately 6'2" to 6'3" in height, weighing about 210 to 220 pounds. [Rep. Tr. p. 918.] She was

shown the Wells purse and said she could not recall it, and upon being shown the Miyauchi purse, the Dixon purse and the Ramirez purse and wallet, she said she was not sure whether she had seen them before. [Rep. Tr. pp. 919-920.] When asked whether she placed any of the foregoing items on Stewart's porch, she said: "I'm not sure but it look like them," and said she put them on his porch sometime in January. She said further that Miss Mitchell was carrying her purse on her left arm and the transistor in her left hand, explaining that she kept the radio but later lost it. [Rep. Tr. pp. 921-923.]

Jackie first learned that Stewart was charged with the various robberies when Logue came to talk to her after her arrest on January 31st. Logue tried to make her say that Stewart was her boy friend but she denied it and told him to "find out the best way you can." [Rep. Tr. pp. 927-928.] When asked whether she ever told anyone about Bookman, she said that she would have told Logue "but he did not approach me right, so I didn't tell him anything." [Rep. Tr. p. 929.] When asked whether she was with Bookman on January 10th, she said she was with him "a lot of times in the morning" but did not remember the date and when asked whether she was with him on January 25th, she said she was not very good at remembering because she had convulsions. Upon being asked whether she was with Bookman on January 30th, she replied that they were staying together in January but she could not "recall what dates." [Rep. Tr. pp. 929-930.]

Earlier on cross-examination, Jackie had said she was born in 1938 but she later testified that she was

born on June 20, 1943, "but I don't go under that date." When asked why she used the 1938 date, she said: "Because I was trying to throw my parole officer off of who I was." [Rep. Tr. pp. 918, 930-931.] Jackie denied that on January 31st Sergeant Logue showed her the items which had been exhibited to her during cross-examination and also denied that at that time she told Logue she had never seen any of them before. [Rep. Tr. pp. 931-932.]

Rebuttal.

Sergeant Logue was recalled by the People in rebuttal. Logue testified that Jackie Jackson, James (Slim) Evans, Lillian Lara and a man named Vernon were arrest for robbery at the time of Stewart's arrest; all were released in the late afternoon of February 5th because there was no evidence to connect them with any crime. [Rep. Tr. p. 937.] Logue had a conversation with Jackie Jackson on January 31st, showing to her the items taken from Mrs. Dixon, Mrs. Wells, Miss Ramirez, Mrs. Miyauchi and Miss Mitchell. He identified each item to Jackie, asking her if she knew anything about it; in each instance she replied that she did not. [Rep. Tr. pp. 938-939.] Bookman's name was never mentioned. [Rep. Tr. p. 940.]

Logue denied telling Stewart that Lillian was sick or upset and likewise denied telling him that Lillian would be released if he would make a confession. He arranged for Lillian to talk to Stewart on February 3rd and denied that she was taken to the University Station to see him on any other date in February. [Rep. Tr. pp. 940-941.]

Logue testified that during their conversation on the evening of January 31st, Stewart said he spent

the previous night at his girl friend's house and that he stayed with her only two or three times a week. Stewart told the officers he thought "that qualified as a permanent address." [Rep. Tr. p. 969.] Logue showed him two of the Wells dividend checks and he said that he had never seen them before and had not endorsed them, explaining also that he did not know Lena Franklin. He gave his girl friend's name as Lillian Davis. After about fifteen minutes, Lena Franklin was brought into the room and said that she knew Stewart as "Roy Wells." Stewart said that he did not know Lena, said he had been in Newman's Market but had never cashed a check there and denied finding the checks. [Rep. Tr. pp. 969-971.] In Stewart's presence, Lena Franklin described the cashing of the checks and said that she had met Stewart in December. [Rep. Tr. pp. 972-973.] Logue reemphasized that the Wells purse was the one he had removed from Stewart's house, had shown to Stewart, and which Stewart said he brought to Lillian's from his former residence. [Rep. Tr. p. 989.]

The conversation of January 31st was recorded and a transcript of the recording was played to the jury; it confirmed Logue's rebuttal testimony in every material respect. [Rep. Tr. pp. 1045-1058.] When Lena confronted Stewart and said he had signed the checks, he made no reply. [Rep. Tr. pp. 1058-1059.]

Sergeant Salvatore L. Mangiameli was also called in rebuttal. Mangiameli testified that he was present during the conversation between Logue and Stewart on the morning of February 3rd. Stewart said he found the Wells dividend checks by a tree at 37th and Western and that he moved the Wells purse to Lillian's house from a

former address. [Rep. Tr. p. 961.] Mangiameli was present during the conversation between Logue and Stewart on the morning of February 4th. Stewart was shown the Mitchell watch and said he had never seen it before. Mangiameli was also present during the conversation between Stewart and Logue on the afternoon of the 4th. The watch was again shown to Stewart, who said that someone whom he did not identify had brought it to his house; he later said that he bought the watch on the street and gave it to Lillian. [Rep. Tr. pp. 961-963.]

Shortly after 8:30 a.m. on February 5th, Mangiameli was present during another conversation between Stewart and Logue. Stewart said he had snatched Miss Mitchell's purse, taken her watch and kicked her. Logue left the room, returned, and after his return Stewart repeated the statement. [Rep. Tr. pp. 963-964.] According to Mangiameli, Lillian was brought to the University Station only on February 3rd and not on February 5th. He was present during many of the conversations between Logue and Stewart, and never heard Logue say that Lillian was sick, not eating, not sleeping or throwing up. He never heard Logue make any promises to Stewart, to induce him to confess, and on occasions when he was alone with Stewart he made no promises to him. [Rep. Tr. pp. 964-966.]

Sergeant A. R. Jensen was also called in rebuttal. Jensen testified that he was present during a conversation between Logue and Stewart at about 11 a.m. on February 1st. The Wells checks were shown to Stewart and at that time he denied having seen them, signed them or cashed them. Jensen was present during another conversation at about 3 p.m. on the same day and Stewart made the same denials. At that time Stewart said he

wanted to speak to Lillian and that he might have something to say about the checks. [Rep. Tr. pp. 1003-1004.]

Mrs. Thomas was recalled as a People's witness. She testified that Miss Mitchell did not own a transistor radio prior to January 1963, and received one from Cyrus Mitchell, Mrs. Thomas' father, about the first of the year. The radio had an ear plug and case similar to the one found in Stewart's house. Mrs. Thomas did not see the radio on January 20th but she saw it on January 21st at Miss Mitchell's house, where it remained until the death of Cyrus Mitchell on May 1st. [Rep. Tr. pp. 1005-1007.] The radio came into the possession of Mrs. Thomas and she kept it until May 3rd. [Rep. Tr. pp. 1007-1008.]

The Penalty Trial.

On the penalty phase of the case, the People introduced documents establishing that Stewart had suffered two prior felony convictions of possessing narcotics and robbery. [Rep. Tr. pp. 1234-1235.]

Callie Durham, Stewart's sister, testified on his behalf that he was 28 years old. He was one of six children and was born in Arkansas, the son of an illiterate sharecropper; the entire family slept in two bedrooms. When Stewart was seven, the family moved to Phoenix and when he was ten, his mother died and his father remarried. [Rep. Tr. pp. 1236-1238.] His education stopped at the 6th grade. [Rep. Tr. pp. 1239-1240.]

Stewart testified briefly. He said that his narcotics conviction was for possessing one marijuana cigarette and he was sent to the Youth Authority. His robbery conviction was for second degree robbery involving three friends of his and someone he did not know; the man

"wanted to have some fun with a girl. So we just took him outside and took his money." [Rep. Tr. pp. 1241-1242.]

Summary of Argument.

1. This case presents the issue whether *Escobedo v. Illinois,* 378 U.S. 478, should be extended. Stewart gave a voluntary confession and made no request for counsel during the course of the investigation. Under *Escobedo,* therefore, his conviction can and should be upheld.

2. *Escobedo* should not be extended as far as the California Supreme Court has extended it in this and in other cases. The "Dorado rule," which dictated the reversal in this case, requires the police, with certain limited and fortuitous exceptions, to advise any suspect in custody whom they wish to question, of his right to counsel and his right to remain silent at an "accusatory stage" which commences, for all practical purposes, at the time of arrest. The rule conditions a denial of "the Assistance of Counsel," not upon an affirmative act of denial, but upon a simple failure to give legal advice.

3. The "Dorado rule" is not needed as a deterrent because traditional standards of voluntariness are adequate to protect persons in custody from police coercion.

4. The "Dorado rule" freezes permanently into the Constitution what we believe are undesirable limitations on the legitimate investigative powers of the police.

5. The "Dorado rule" supplements the standards of voluntariness with a system of warnings and waivers that will not clarify the problem of determining the admissibility of extra-judicial statements.

ARGUMENT.

I

The "Dorado Rule" Is an Unnecessary Extension of Escobedo v. Illinois.

A. The "Dorado Rule" Purports to Be a Constitutional Command.

On June 22, 1964, this Court decided *Escobedo v. Illinois,* 378 U.S. 478. At the beginning of its opinion, this Court framed the issue as follows:

> "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S. 335, 342, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation." (*Id.* at 479.)

And, at the end of the opinion, this Court ruled as follows:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, 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, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (*Id.* at 490-491.)

On January 29, 1965, the California Supreme Court decided *People v. Dorado,* 62 Cal. 2d 338, 398 P. 2d 361. In the body of its opinion, and in the course of elaborating what has come to be known as the "Dorado rule," the California Court held:

> "We conclude, then, that defendant's confession could not properly be introduced in evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) *the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights.*" (62 Cal. 2d at 353-354, 398 P. 2d at 371. Emphasis added.)

This case is a child of *Dorado* and a grandchild of *Escobedo.* Applying *Dorado,* the California Court held it reversible error to allow in evidence Stewart's volun-

tary confession to the murder of Miss Mitchell. Despite the fact that Stewart did not request counsel and was not denied counsel, the Court ruled that the authorities were obliged to advise him of his right to counsel and his right to remain silent and that it would not be presumed from a silent record that they did so. (*People v. Stewart,* 62 Cal. 2d 571 at 579-581, 400 P. 2d 97 at 102-103.)

There can be no doubt as to the character of the "Dorado rule." It is not a state rule of evidence designed to implement specific guarantees of the Bill of Rights or to give flesh to the vaguer contours of due process. (Compare *People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905, with *Mapp v. Ohio,* 367 U.S. 643 and *Ker v. California,* 374 U.S. 23; compare *People v. Aranda,* 63 A.C. 542, 407 P. 2d 265, with *Delli Paoli v. United States,* 352 U.S. 232 and *Jackson v. Denno,* 378 U.S. 368.) On the contrary, the California Court regards it as a command of the Constitution. As Chief Justice Traynor said in a later case:

> "The reasons and authorities set forth at length after the hearing and rehearing in *People v. Dorado,* 62 Cal. 2d 338 [42 Cal. Rptr. 169, 398 P. 2d 361] compelled this Court, as they have other courts, in being faithful to the Constitution of the United States as interpreted by the United States Supreme Court, to hold that the rule of the Escobedo case does not depend upon a request for counsel." (*People v. Roberts,* 63 A.C. 79 at 89, 403 P. 2d 411 at 417.)

B. Stewart's Conviction Must Be Sustained Unless the "Dorado Rule" Is, in Fact, a Constitutional Command.

The facts in *Escobedo* are so well known that it would be superfluous to repeat them. Suffice it to say that while being questioned by the Chicago police, Escobedo sought to consult with his own attorney, his attorney sought to consult with him, and their requests were effectively refused.

The facts of this case differ from those of *Escobedo* in every respect which this Court deemed essential to the *Escobedo* reversal. Stewart was not kept from consulting with his lawyer. He was not kept incommunicado. He was not questioned by a prosecuting attorney. No accomplice was sent in to accuse him falsely. The questions asked him involved no subtle points of law unknown to laymen. For the most part, they concerned the stolen property that was found in his own home.

Stewart was 28 years old at the time of trial. He had previously been convicted in the Los Angeles Superior Court of robbery and possessing narcotics. Although he attributed his confession to a promise to release Lillian Lara, his testimony was unworthy of belief. Lillian had been arrested because the Mitchell watch and the Miyauchi purse were found among her jewelry and clothing in a bureau drawer in the bedroom and because a key attached to the purse opened the front door of the house. The officers denied using Lillian as a pawn to obtain his confession. Despite the confession, Stewart denied robbing Mrs. Wells, Mrs.

Dixon, Mrs. Miyauchi and Miss Ramirez. Although this Court refrained from finding that Escobedo's confession had been coerced, the conduct of the Chicago police radiated an aura of impropriety. 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 six-year-old child knows that killing is worse than stealing.

It is accordingly unnecessary for us to ask that *Escobedo* be overruled. Under the *Escobedo* facts and the *Escobedo* holding, Stewart's conviction can and must be sustained. All we ask is that *Escobedo* not be extended, for it is clear that the California Court has excised from the *Escobedo* holding the element of a request for counsel and the refusal of the request, and has grafted onto that holding the elements of a warning and a waiver.

C. The Reasons Assigned for the "Dorado Rule" Do Not Warrant Its Acceptance as a Command of the Constitution.

The Court advanced two principal reasons for extending *Escobedo*. First: Placing a living screen between the suspect and the police will reduce the chances of coercion. (*In re Lopez,* 62 Cal. 2d 368 at 372-75, 398 P. 2d 380 at 383-85.) Second: Advising all suspects of their rights will protect the poor, the ignorant and the unwary. (*People v. Dorado,* 62 Cal. 2d 338 at 351, 398 P. 2d 361 at 369-70.) We challenge both bases for the "Dorado rule."

1. Everyone knows that there are a few officers who indulge in the kind of questioning condemned by the decisions of this Court, just as there are a few

who accept bribes and plant evidence in the pockets of innocent people. But we do not believe that in every police station there is a little room where people are beaten or subjected to less visible pressures to get them to confess. Over the years, this Court has formulated detailed standards of voluntariness and has applied them in a host of cases, culminating in the exclusion of a statement "secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. *Haynes v. Washington,* 373 U.S. 503." (*Malloy v. Hogan,* 378 U.S. 1 at 7.) We think that these standards are workable, that they are being followed, and that they need not be replaced by any stronger whips. Indeed, it has been said that "[a]s a deterrent, *Escobedo* looks like an atomic bomb used to effectuate a slum-clearance project." (*Escobedo* in the Courts: May Anything You Say Be Held against You?, 19 Rutgers L. Rev. 111 at 135.)

2. Everyone knows that some suspects can afford to hire lawyers while others can not, and there is understandable concern with "the unknowing defendant who responds to police questioning because he mistakenly believes he must and that his admissions will not be used against him." (Mr. Justice White, dissenting in *Escobedo v. Illinois,* 378 U.S. 478 at 499.) But as Mr. Justice White went on to note: "Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights." (*Loc. cit.*) And the reasoning of the California Court is based upon two questionable assumptions, one of law and one of fact. We take issue with each.

The first assumption is an unarticulated hypothesis that the Sixth Amendment has been "incorporated" or "absorbed" into the equal protection clause of the Fourteenth Amendment. This Court has indeed said that if a state provides a system of appellate review the system must be open to all on equal terms. If a man is too poor to hire a lawyer to write a brief, the state must pay a lawyer to write one. (*Douglas v. California,* 372 U.S. 353.) If he is too poor to buy a transcript, the state must buy him one. (*Griffin v. Illinois,* 351 U.S. 12.) But there is no analogy between a judicial procedure set up to vindicate the rights of convicted persons and the informal process of gathering evidence which may not even be presented at a trial.

The second assumption is that most suspects do not know their rights and must be told of them. This is surely untrue, not only of recidivists like Stewart, but also of the vast majority of citizens in a country where, by ten years ago, the privilege against self-incrimination had already "attained the familiarity of the comic strips . . ." (Mr. Justice Frankfurter, concurring in *In re Groban,* 352 U.S. 330 at 337.)

Stewart knew perfectly well what he was about while prowling the streets of a city in which he had twice before been convicted of serious crimes. He was cunning enough to use his hands and feet as his principal weapons, cunning enough to leave no fingerprints, cunning enough to work before sunrise and after dark, and cunning enough to strike from behind, so that he could not readily be identified. That cunning did not desert him on the witness stand. At one point during cross-examination, Stewart testified that he asked the officers on February 4th if he could

talk to Lillian Lara and said that after he talked to her he might have something to tell them. When asked what he had in mind, he said: "I would rather not answer that," and when the judge directed him to answer, he flatly refused to comply. [Rep. Tr. pp. 858-859.] 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.

In summary, therefore, we maintain that the reasons assigned by the California Court do not support its view that *Dorado* is entailed by *Escobedo*. It is now time to give our own reasons why *Escobedo* should be limited to its facts and to penumbral variations of its facts.

II.

The "Dorado Rule" Is an Undesirable Extension of Escobedo v. Illinois.

A. As Interpreted and Applied, the "Dorado Rule" Unjustifiably Inhibits the Legitimate Questioning of Uncautioned Suspects Except Under Fortuitous Circumstances.

The "Dorado rule" is, of course, a rule of exclusion. It applies not only to confessions and incriminating admissions, but also to exculpatory statements later proved to be false. (*People v. Hillery,* 62 Cal. 2d 692, 401 P. 2d 382; *People v. Nye,* 63 A.C. 162, 403 P. 2d 736; *People v. Williams,* 63 A.C. 471, 406 P. 2d 647.) And it serves to exclude, at a subsequent trial, the testimony of a defendant given at a former trial, where it appears that the former testimony was impelled by the need to explain a confession or admission

improperly received under *Dorado.* (*People v. Polk,* 63 A.C. 461, 406 P. 2d 641.)

In the present case, the California Court clarified the "Dorado rule" by adopting what has come to be known as the "Stewart test." The test was designed to determine the advent of the "accusatory stage" of a police investigation: that is, the time when the police are required, under *Dorado,* to advise a suspect of his right to remain silent and his right to counsel.[4]

The Court began by saying that an arrest satisfies the first two conditions of the *Escobedo* holding: that "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" and that "the suspect has been taken into police custody." (*People v. Stewart,* 62 Cal. 2d 571 at 577-578, 400 P. 2d 97 at 101.)[5] Then the Court turned to the third *Escobedo* condition. How was it to decide whether the police had carried out "a process of interrogations that lends itself to eliciting incriminating statements?" Disregarding "the subjective intent of the interrogators," the Court said it would analyze "the total situation which envelops the questioning by considering 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." (*People v. Stewart,* 62 Cal. 2d 571 at 579, 400 P. 2d 97 at 102.)

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[4]It is now settled in California that both warnings must be given. (*People v. Stockman,* 63 A.C. 519 at 524-25, 407 P. 2d 277 at 280-81.)

[5]It is now settled in California that these conditions can be met even before an arrest if, under certain circumstances, the suspect is merely detained for questioning. (*People v. Furnish,* 63 A.C. 536 at 540-41, 407 P. 2d 299 at 302-03.)

It may be objected at the outset that the foregoing test is of little help as a guide to prospective police conduct. In terms, it is a retrospective formula for determining whether a defendant's incriminating statements should have been admitted or excluded at his trial. All it tells the investigating officer is that his own conduct is relevant and that all other relevant circumstances are also relevant. But it is clear from the later California cases that unless there is proof to the contrary, the Court will presume that a "process of interrogations" was one which did lend "itself to eliciting incriminating statements." (*People v. Stockman,* 63 A.C. 519 at 523-24, 407 P. 2d 277 at 280, and cases cited.) And, in one case, the Court specifically held that it would apply the same presumption where "no evidence indicates that the statements are in the nature of spontaneous disclosures." (*People v. Luker,* 63 A.C. 485 at 494-95, 407 P. 2d 9 at 15.)

By now there can be no doubt of the reach and scope of the "Dorado rule" as clarified by the "Stewart test." Subject to the exception noted above and one to be noted below, no statement made by a suspect to the police after his arrest can be admitted in evidence against him, unless, at the very least, he has been advised of his right to remain silent and his right to counsel and has knowingly and intelligently waived these rights. Bearing in mind that an arrest without a warrant may be made upon probable cause, that most arrests are made without a warrant, and that probable cause may be based upon hearsay which is inadmissible at a judicial trial, it is plain that the California Court has obliterated the distinction between "investigation" and "accusation" which, in *Escobedo,* this Court

was so careful to preserve, and has accepted, in all but name, the stringent view that the right to counsel attaches, *ex proprio vigore,* and with all its ramifications, no later than the time of arrest.

The two exceptions reinforce what has just been said. Statements elicited in order to save another's life may be admitted because of the need for saving life. (*People v. Modesto,* 62 Cal. 2d 436, 398 P. 2d 753; *People v. Jacobson,* 63 A.C. 335, 405 P. 2d 555.) And, as previously mentioned, spontaneous, unsolicited statements may also be admitted, including an unprompted and uninterrupted narrative given in response to a neutral inquiry, such as "What happened?" (*People v. Cotter,* 63 A.C. 404, 405 P. 2d 862. See also, *People v. Dorado,* 62 Cal. 2d 338 at 354, 398 P. 2d 361 at 371; *People v. Jacobson,* 63 A.C. 335, 405 P. 2d 555; *People v. Luker,* 63 A.C. 485 at 494-95, 407 P. 2d 9 at 15.)

The Court has indeed declared that it does not intend "to discourage a defendant from volunteering to the police his complicity in the perpetration of a crime nor to prohibit the police from receiving and acting upon such confessions." And it has also declared that it has never "taken the position that the desire of a guilty man to confess his crime should be stifled, impeded, discouraged, or hindered in any way." (*People v. Cotter,* 63 A.C. 404 at 412 and 414-15, 405 P. 2d 862 at 866 and 868.)

Yet if the police can only receive and act upon statements which are actually volunteered or are obtained in order to preserve life, then the admissibility of the voluntary confession of an uncautioned suspect will de-

pend upon how quickly he feels remorse or upon the fortuitous chance that an undiscovered victim may still be alive. We submit that this is not and should not be the law.

B. Requiring a Warning Will Unjustifiably Inhibit the Legitimate Questioning of Suspects Under Any Circumstances.

The officers who arrested Stewart, questioned him and took his voluntary confession surely thought that they were investigating a series of unsolved crimes. His house was littered with stolen property, some being found in a bedroom closet, some in bureau drawers, some on top of a television set and some under a pile of dirty shirts on the back porch. At the time of his arrest, the officers had good reason to believe that he had fraudulently endorsed and cashed the dividend checks belonging to Mr. and Mrs. Wells. Four other persons were in the house and for aught the officers knew, any or all of them might have been involved, if not in the robberies themselves, then as fences or receivers of stolen goods. Each robbery was accompanied by insensate and wholly unnecessary violence, one woman being kicked to death, one sustaining a broken jaw, one a fractured skull and nose, the others head injuries of a less grievous nature. The last robbery took place the day before Stewart's arrest. The officers had no way of exonerating anyone in the house except by asking questions. And this they proceeded to do.

Bearing in mind that Stewart made no request for counsel and that the most reasonable inference to be drawn from the record is that he knew he did not have to speak, what course of action could he have taken had the officers advised him on the morning

of February 5th of his right to counsel and his right to remain silent? For that was the time when, according to the Court, the police were obliged to give a caution. (*People v. Stewart,* 62 Cal. 2d 571 at 579-80, 400 P. 2d 97 at 102.) It is obvious that Stewart could have done one of two things: requested an attorney or declined the assistance of counsel.

As mentioned earlier, the "Dorado rule" forbids, in the absence of a warning and a waiver, all but the most innocuous questioning of the most voluble suspects except in emergency cases. Will the American system of criminal justice be affected if the police are required to give legal advice? We fear that it will be, and that the effects will be grave, grave enough to give pause.

Thousands of serious criminal cases have been solved and could only have been solved by asking questions of the people most likely to know the answers.[6] It is not enough to say that the police should not resort to questioning, or that they should devise more dynamic, more skillful, more imaginative methods of detection. For the police can only find what the criminal has left for them to find. No miracle of modern technology can identify and preserve evidence when it does not exist.

Interrogation, therefore, is a necessary and unavoidable part of police work and one which society has found no means of replacing. But should the "Dorado rule" receive the *nihil obstat,* interrogation may well

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[6]According to the Police Commissioner of New York City, half the New York murder cases solved in 1963 and 1964 were solved either in whole or in part by means of a confession. (*United States v. Cone,* .... F. 2d .... [2d Cir.], at p. 3404 of Slip Opinion, fn. 18.)

be at an end. This conclusion is not ours alone. It has already been drawn by scholars who welcome the rule. (Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio S.L.J. 449 at 494 and 496-500; *Escobedo* in the Courts: May Anything You Say Be Held against You?, 19 Rutgers L. Rev. 111 at 135-39; Rothblatt, Police Interrogation and the Right to Counsel, Post Escobedo v. Illinois: Application v. Emasculation, 17 Hastings L.J. 41 at 52.)

A number of years ago, the late Mr. Justice Jackson wrote that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." (*Watts v. Indiana,* 338 U.S. 49 at 59.) The salt has not yet lost its savor. For the California Court said in a recent case: "As a discussion with counsel before interrogation cannot anticipate every possible question put to the accused (See Enker and Elsen, *Counsel for the Suspect* (1964) 49 Minn. L. Rev. 47, 64), the accused would seem to be entitled to have counsel with him during interrogation unless he clearly and knowingly waives that right." (*People v. Stockman,* 63 A.C. 519 at 525-26, 407 P. 2d 277 at 281.)

Suppose a man is arrested for felony and taken to the police station. There he is advised of his right to a lawyer and one is obtained for him out of a telephone book, from a referral list, or from the public defender's office. If he is guilty, it is desirable that he confess his guilt provided that no one makes him confess. If he is innocent, it is equally desirable that he be released.

The lawyer comes to the station knowing nothing at all about the case. The suspect presumably knows a good

deal about it or he would not be where he is. The lawyer cannot know what to allow him to say or whether to allow him to say anything until he knows both what the police know and what his new client knows. But the discovery rules do not apply to the police station and the police cannot stop investigating while the lawyer follows their tracks. Hence the lawyer will, if he is prudent, advise the suspect to say nothing, though doing so might delay disclosure of an alibi until the witnesses have disappeared, delay disclosure of some other defense until it is no longer credible, delay the tracing of stolen property until it is no longer traceable, or delay the identification of confederates until they can no longer be captured. Such incongruous and undesirable results find no support in the text of the Sixth Amendment, and none in its history, its purpose or its prior interpretation. (See Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 at 941-51.)

C. Requiring Warnings and Waivers Will Not Simplify the Task of Determining the Admissibility of Incriminating Statements.

The corollary of the *Dorado* warning is the *Dorado* waiver. There was no waiver in *Escobedo* for the reason that Escobedo was denied access to his own counsel and said nothing from which it could be inferred that he wished to dispense with his own counsel. Since *Escobedo* turned on the denial of a request, it does not follow from *Escobedo* that the police need obtain from a suspect who has made no request a knowing and intelligent waiver of his right to counsel before asking him any questions.

It might be supposed, given the "Dorado rule," that a suspect waives his privilege against self-incrimination by proceeding to answer questions after being told of his right not to. It might also be supposed that he waives his right to counsel by not asking for an attorney after being told of the right. But under *Dorado,* the police must decide, in the first instance, and not always at leisure, whether the suspect has "knowingly and intelligently" waived his rights, because without such a waiver they cannot ask him questions.

How are the police to determine whether any particular waiver is a "knowing and intelligent" one? As the California Court has said, resolving a waiver problem "requires a difficult though not impossible subjective determination . . ." (*People v. Mathis,* 63 A.C. 434 at 450, 406 P. 2d 65 at 75.)

The investigating officer is most likely to know if he gave a warning, but the suspect is most likely to know if he understood what the officer said. And if there was no warning, only the suspect will know if he was aware of his rights nonetheless. One suspect may be poor and ill-educated but capable of intelligent choice. Another may be rich and well-educated but incapable of intelligent choice. The officer must make a shrewd guess, and his margin of error will be one of constitutional dimensions.

Furthermore, once a case leaves the squadroom and enters the courtroom, it will be found that the subjective factors involved in determining the effectiveness of a waiver are essentially the same as those involved in determining the voluntariness of an extra-judicial statement. These include the age of the suspect, his

intelligence, his education, his prior experience with the law, his physical and emotional condition, as well as other variables. We question the value of superimposing upon the standards of voluntariness a new standard of admissibility involving the same percepts but different concepts.

In the present case, the record does not disclose whether Stewart was advised of his right to counsel and his right to remain silent. The California Court held that since he gave his confession before the decision in *Escobedo,* it would be impossible to impute to him a knowledge of rights which he could not know he had until *Escobedo* said he had them. (*People v. Stewart,* 62 Cal. 2d 571 at 581, 400 P. 2d 97 at 103.) But it must be kept in mind that Stewart had two prior felony convictions, that prior to *Escobedo* the California statutes recognized the right of arrested persons to contact counsel and of counsel to visit persons under arrest,[7] and that the most reasonable inference from the record is that Stewart knew he did not have to talk to the police. It must also be kept in mind that Stewart claimed that his confession was involuntary and that, as mentioned earlier, this Court has always weighed a defendant's ignorance of his rights in determining questions of voluntariness. If Stewart did not know his rights, surely that fact, if it was a fact, would have been brought out during the course of his own testimony. We submit, therefore, that even if the "Dorado rule" is correct, Stewart is in no position to invoke the rule.

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[7]Cal. Penal Code, §§ 825 and 851.5.

Conclusion.

The scope of *Escobedo v. Illinois* is one of the most urgent of current constitutional questions. It has divided the States and the Circuits. Our position is best summed up in the words of Chief Judge Lumbard, speaking for the United States Court of Appeals for the Second Circuit:

> "Until *Escobedo* it had never been seriously urged that the mere failure to advise a suspect of his right to remain silent and his right to counsel would of itself, absent other factors evidencing unfairness or coercion, invalidate the use of any statement made thereafter by the accused. Compare *Crooker v. California,* 357 U.S. 433, 441 (1958) (dissenting opinion). So far as federal practice is concerned, and so far as state practice was concerned until some recent state court extensions of language in *Escobedo,* the police of this country have not made it a practice to give such warnings. We are aware that for some years it has been the practice of the Federal Bureau of Investigation so to advise, but the Federal Rules of Criminal Procedure have recorded no such requirement. We find nothing in the language or prior interpretations of the Federal Constitution, or in reason, which requires that every person suspected of crime be advised of his rights to silence and to counsel, failing which *any* statement thereafter made is inadmissible. See *United States v. Wilson,* 264 F. 2d 104 (2 Cir. 1959)." (*United States v. Cone,* .... F. 2d ...., at pp. 3401-02 of Slip Opinion.)

It is accordingly requested that the judgment of the Supreme Court of California be reversed.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions Involved.

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Fourteenth Amendment, Section 1:

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