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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.

REPLY TO MOTION TO DISMISS.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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The appellate jurisdiction of this Court extends, and for nearly two hundred years it has extended, to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." (28 U.S.C. 1257.) In a dismissal motion appended to his brief, Stewart urges that the judgment herein is not "final." We take issue with his contention.

It may be conceded that the Stewart writ is virtually without precedent. Despite a diligent search, we have found no case in which this Court has granted certiorari to review a judgment of the highest court of a state reversing a criminal conviction upon grounds apart from the construction of a statute or some supposed

incompatibility between a state statute and federal law. But that fact affords no proof of improvidence. On the contrary, it is simply a product of the history of this Court.

Not until the present generation did this Court apply to the states any of the specific guarantees of the Bill of Rights pertaining to criminal cases. It was but one year ago that this Court applied the confrontation clause of the Sixth Amendment. (*Pointer v. Texas,* 380 U.S. 400.) It was but two years ago that this Court applied the self-incrimination clause of the Fifth Amendment. (*Malloy v. Hogan,* 378 U.S. 1.) It was but three years ago that this Court held that under the Sixth Amendment an indigent defendant is entitled to appointed counsel at the trial of a non-capital felony. (*Gideon v. Wainwright,* 372 U.S. 335.) It was but five years ago that this Court applied the federal exclusionary rule in aid of the Fourth Amendment. (*Mapp v. Ohio,* 367 U.S. 643.) The first state confession case was decided in 1936. (*Brown v. Mississippi,* 297 U.S. 278.) And the first case requiring the appointment of counsel at the trial of a capital charge is but four years older. (*Powell v. Alabama,* 287 U.S. 45.)

Each of the foregoing cases arose from the affirmance of a conviction or the denial of a post-conviction remedy. As mentioned earlier, this is the first case of its kind to arise from a reversal. If Stewart is correct, then the appellate jurisdiction of this Court is a one-way street, a road open to the accused but not to his accuser, a medium of expansion but not a channel of restraint.

We submit that there is no warrant in the statute for such an unfair and anomalous result. For were

this Court without power to review, at the behest of a state, a faulty construction of *Malloy,* or *Mapp,* or another, there would be no means to enforce in criminal cases that peremptory clause which reads: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., Art. VI, Cl. 2. See *Martin v. Hunter,* 1 Wheat. 304 at 340-48; *Cohens v. Virginia,* 6 Wheat. 264 at 376, 381, 385, 413-23.)

It must be borne in mind that we are not challenging some interlocutory pre-trial order. (Compare *Carroll v. United States,* 354 U.S. 394 and *DiBella v. United States,* 369 U.S. 121.) Nor can there be any doubt that the scope of *Escobedo* is "ripe" for review. (*Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379 at 382; *Brown Shoe Co. v. United States,* 370 U.S. 294 at 309.) And it is clear that the "Dorado rule" involves very "serious public consequences" indeed. (*Radio Station WOW v. Johnson,* 326 U.S. 120 at 124.)[1]

We are told nevertheless that the questions in this case may not be reviewed and resolved in this Court because Stewart is to be retried and the course of the retrial may dispose of them forever. But this argument is based upon a series of premises irrelevant to the present posture of the case and which assume the issue of the litigation.

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[1]During 1964, the latest full year for which statistics are available, 32,801 felony defendants were processed in the California Superior Courts, 8,334 of them coming to trial. (Crime in California [1964], p. 121. Table V-8.) Commencing January 29, 1965, the California Supreme Court has upset 20 judgments of death on the basis of the "Dorado rule."

Conceding that the questions are "serious and unsettled,"[2] Stewart denies that they are "fundamental to the further conduct of the case,"[3] because the People might prove at the retrial that he waived his right to counsel. It is sufficient to say of this argument that Stewart is assuming the validity of his own position on the merits. Next he denies that the questions are "independent of, and unaffected by"[4] what may occur at the retrial, again, because the People might prove that he waived his right to counsel and, also, because he might prove that his confession was coerced. But if the latter point has been reserved, as Stewart says, this was not because the California Supreme Court conceived its decision as a mere intermediary ruling, a short pause for breath in the judicial process. On the contrary, the California Court deemed the "Dorado rule" to be controlling and both legally and logically prior to the question of coercion which it declined to consider. As to the "Dorado rule" and the "Stewart test," we face the last word of a court of last resort. That, we submit, should be enough to invoke the jurisdiction of this Court.

We recognize, of course, that under California law, an unqualified judgment of reversal sets a lawsuit at large and that, on one occasion at least, this Court has regarded the rule as a bar to further review. (*Gospel Army v. Los Angeles,* 331 U.S. 543 at 546, and cases

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[2]*Cohen v. Beneficial Loan Corp.,* 337 U.S. 541 at 547; *Brady v. Maryland,* 373 U.S. 83 at 85, fn. 1.

[3]*United States v. General Motors Corp.,* 323 U.S. 373 at 377; *Land v. Dollar,* 330 U.S. 731 at 734, fn. 2; *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682 at 685, fn. 3; *Brady v. Maryland,* 373 U.S. 83 at 85, fn. 1; *Gillespie v. U.S. Steel Corp.,* 379 U.S. 148 at 153-54.

[4]*Radio Station WOW v. Johnson,* 326 U.S. 120 at 126; *Brady v. Maryland,* 373 U.S. 83 at 85, fn. 1.

cited.) But our cause is not without portent, for a number of years after *Gospel,* this Court envisioned the propriety of what we seek to do and our right to seek to do it. Speaking for the majority in *Rogers v. Richmond,* 365 U.S. 534, at footnote 4 on pages 546-47, the late Mr. Justice Frankfurter said:

> "A different question was implicitly presented in *Stroble v. California,* 343 U.S. 181. In that case the trial judge permitted the confessions to go to the jury under instructions which told it to disregard them if it found that they were not voluntarily made, and which adequately defined the 'voluntariness' required by due process. See *Lyons v. Oklahoma,* 322 U.S. 596, 601. Thus, there was no flaw in the verdict rendered. *An erroneous legal standard for determining the admissibility of allegedly coerced confessions was interjected into the proceeding only at the level of the Supreme Court of California. Had the State Supreme Court, under similar circumstances reversed the conviction, not on the basis of local law but solely by reason of a misinterpretation of this Court's principles governing coerced confessions, and had the case been brought here for review on certiorari, the jury's verdict would have had to be reinstated.* In any event, the question presented in *Stroble* was not faced squarely, and in illuminating isolation, in that case. Compare *Lee v. Mississippi,* 332 U.S. 742, with *Stroble.*" (Emphasis added.)

A final word is in order. One salutary purpose of the first Judiciary Act and of its successor statutes was to protect this Court from untimely claims of er-

ror. But it was not the purpose of that act to give to the courts of any state an indiscriminate immunity from review. Nor should it be interpreted so as to preclude this Court from deciding federal questions which are ripe for adjudication. If the People of the State of California cannot be heard, they have been denied a right accorded to the meanest litigant, a right which, to name no others, this Court has accorded to Ernesto Miranda, to Sylvester Johnson, to Stanley Cassidy, to Michael Vignera, and to Carl Calvin Westover. And if the People of the State of California cannot be heard, they have been denied a right older and more fundamental than any articulated in the Constitution or its Amendments, a right which has been affirmed since the times of the Old Testament: the right to be heard itself.

Conclusion.

It is therefore requested that the motion to dismiss be denied.

Respectfully submitted,

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