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IN THE

Supreme Court of the United States

October Term, 1965.

No. 762.

SYLVESTER JOHNSON and STANLEY CASSIDY,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Brief for Respondent

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COUNTER-STATEMENT OF FACTS.

Shortly after 6:00 P. M. on the evening of Friday, January 24, 1958, Edward J. Davis, who owned and operated a toy shop at 1731 Broadway (next door to the northwest corner of Broadway and Ferry Avenue, Camden, New Jersey (NJ/JA 43a-44a), came running out of his store calling for help (NJ/JA 44a). He was heard to shout, "Help! I am shot" (NJ/JA 54a). He was bleeding profusely (NJ/JA 56a-57a). He collapsed to the sidewalk from the arms of one of his neighbors who rushed to his aid (NJ/JA 24a-32a). The police were notified and within a few minutes thereafter, a police patrol car ambulance rushed Davis to the hospital (NJ/JA 75a). Approximately thirty-five minutes after entering the hospital, Davis died (NJ/JA 98a).[1]

Subsequent examination revealed the presence of seven gunshot wounds on Davis' body (NJ/JA 112a). The medical examiners concluded that Davis had been shot four times (NJ/JA 112a-116a). There were no powder burns on the body (NJ/JA 119a). One bullet entered the right side of the nose, another in the right cheek bone and a third in the neck at the left of the Adams apple (NJ/JA 116a-117a), with the fourth entering through the left groin.

Death resulted from hemorrhage due to the perforating wound of the liver and right lung which, in turn, was caused by the bullet which entered the body through the left groin and passed upward through his small bowel, liver, lung and posterior wall of his chest (NJ/JA 117a-118a).

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[1] Citations to the portions of the Joint Appendix supplied to this Court and printed in the Transcript of Record will be prefixed "T. R." Citations to the entire record of the trial printed as a joint appendix which was filed with this Court as appendix C of the Petition for Certiorari filed in October Term, 1960, No. 1133 Misc. will be prefixed "NJ/JA."

At the time he was admitted to the hospital he had $294.24 in cash on his person (NJ/JA 95a).

The first leading clue to the solution of the murder came from a witness who, while waiting for a red traffic signal at the corner of Fourth Street and Ferry Avenue, observed the automobile belonging to defendant, Wayne Godfrey, going through the red light and turning into Ferry Avenue. He noted the license number and general description of the vehicle. He also noted that the vehicle stopped on Ferry Avenue between Fourth and Third Streets and started up again (NJ/JA 185a-186a). When this motorist learned of Davis' death, he remembered the motor vehicle violation occurred at about the same time as the homicide (NJ/JA 189a). He thereupon notified the police of the license number and learned that the car was registered in the name of Wayne Godfrey.

The State proved that several days before the murder, Cassidy called at Brimm's house and obtained from him his .25 calibre automatic, under the pretense of holding it for him. Cassidy returned the gun to Brimm on Friday, January 24th, about 7:00 or 8:00 P.M. (NJ/JA 249a-252a); on the night preceding the attempted robbery of Davis, Godfrey called at his friend, Walker's home, and borrowed Walker's loaded .32 calibre revolver. It later turned out to be the murder weapon (NJ/JA 227a-241a-264a-268a). Godfrey returned the murder weapon to Walker on Friday night after the shooting (NJ/JA 229a-231a).

Noah Hamilton testified that six or eight weeks before the fatal shooting he had a conversation with defendant, Godfrey, at which time, Godfrey asked him if he wanted to make some money and suggested a hold-up of a toy store at Broadway and Ferry Avenue (NJ/JA 287a-289a). Hamilton further stated that he met Godfrey about 9:00 or 10:00 o'clock in the evening of Friday, January 24th, at a taproom. He stayed with Godfrey at the taproom till about midnight

when they drove off to meet Godfrey's wife (NJ/JA 269a-271a). While waiting for Godfrey's wife to appear, Godfrey asked Hamilton to buy a newspaper and look for a hold-up and shooting at Broadway and Ferry Avenue. When Hamilton told Godfrey about the newspaper account of a hold-up and shooting at Broadway and Ferry Avenue, Godfrey said, "That was it" (NJ/JA 273a-275a).

The three defendants with the two previously secured guns, arranged to rob the victim, and pursuant to their plan, Godfrey drove his car to Cassidy's home. There he picked up Cassidy and Johnson and drove them to Broadway and Ferry Avenue. He parked his car around the corner. Godfrey waited in the get-away car; Johnson and Cassidy, both armed with the guns, entered the Davis toy store and pretended to be shoppers. While there, Johnson fingered a toy truck. After surveying the premises, they both left and returned to the Godfrey car. The three of them discussed the matter between themselves. Cassidy and Johnson decided to return to the store and go through with their plan to rob Davis and take the toy truck with them that Johnson already realized carried his fingerprints.

Still armed with the previously secured guns, Cassidy, with the gun that he obtained from Brimm, and Johnson, with the revolver that was obtained for him by Godfrey, returned to the Davis store. Cassidy attempted to attract Davis to the rear of the store. Davis followed him. Johnson was in back of Davis. When they reached about the center of the store, Johnson, with his loaded gun drawn, announced to Davis, "This is a stick-up." Davis resisted. He made some effort to rebuff Johnson. In turn, Johnson started to fire his gun and shot Davis four times. Davis, mortally wounded, staggered out through the front of his store to the sidewalk. Cassidy and Johnson escaped through the rear door, they pulled off its hinges—it had been nailed tight. Cassidy ran back to the car where Godfrey was wait-

ing. Johnson ran down Ferry Avenue where he was picked up by Godfrey a few minutes later, about a block and a half away. Godfrey dropped Johnson off near his home and Cassidy near his.

The following day, Johnson, accompanied by Cassidy and Godfrey, took flight to Newark. Noah Hamilton accompanied them. Godfrey, Cassidy and Hamilton returned to Camden later that night. Johnson remained in Newark until he was apprehended by the police.

The police took Godfrey into custody on Tuesday afternoon, January 28, 1958 (NJ/JA 197a), at 4:00 A.M., the following morning, January 29th, Cassidy was arrested (NJ/JA 201a) and Johnson was apprehended in Newark late in the afternoon of the same day (NJ/JA 204a).

All three of the defendants confessed to their participation in the attempted robbery and the murder (Cassidy, NJ/JA 458a-480a-485a-489a-492a-495a; Godfrey, NJ/JA 508a-539a, 542a-547a; Johnson, NJ/JA 555a-581a).

At the trial of the defendants, the trial court heard testimony on the questions of the admissibility of the defendants' confessions out of the presence of the jury (T. R. 85a-206a). In the case of Stanley Cassidy, Chief of Detectives, Dube, testified that prior to taking the defendants' statement, Cassidy was warned of his rights and informed of the nature of the crime under investigation. Chief Dube stated to the defendant, Cassidy:

> "I am going to ask you some questions as to what you know about the hold-up, but before I ask you these questions, it is my duty to warn you that everything that you tell me must be of your own free will, must be the truth, and without any promises or threats made to you, and knowing anything you tell me can be used against you, or any other person, at some future time" NJ/JA-459a).

Chief Dube further testified that there were no threats, promises, acts of violence or intimidation (T. R. 115a).

At the conclusion of Chief Dube's testimony, the defendant, Cassidy, through his attorney, stated: "Defendant Cassidy does not admit but does agree with all answers given by Chief Dube" (T. R. 115a). The testimony of Chief Dube was further substantiated by Sergeant Conley of the Camden Police Department (T. R. 120a-121a), Captain Philip Large of the Prosecutor's Office and Mr. Fred Albert, the official court stenographer[2] (T. R. 126a), all of whom stated that no threats, promises, physical violence or assault was used.

After the State presented all of its evidence to prove the voluntariness of Cassidy's confession, the court asked of the defendant's, Cassidy, attorney: "Does the defendant, Cassidy, have any testimony or evidence that he desires to offer as to the voluntary nature of his confession or confessions?" (T. R. 138a). The defendant's attorney responded: "No, your honor" (T. R. 138a). Again the court asked, "No evidence on his behalf in this respect?" (T. R. 138a). The defendant's attorney stated, "That is correct" (T. R. 138a).

Cassidy's attorney argued in his summation, "Our Prosecutor cannot say that Stanley Cassidy lied. Whatever is in this statement made by Stanley Cassidy is true. I know it

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[2] Mr. Albert, official court stenographer, who recorded the confession, stenographically, testified that before the confession was given, Chief Dube made the following statement to Cassidy:

> "I am going to ask you some questions as to what you know about the hold-up, but before I ask you these questions it is my duty to warn you that everything you tell me must be of your own free will, must be the truth, without any promises or threats having been made to you, and knowing anything you tell me can be used against you, or any other person, at some future time. Do you understand what I have just said to you, Stanley?
>
> A. Yes, I understand.
>
> Q. Under those circumstances are you willing to answer my questions?
>
> A. Yes." (NJ/JA 459a-14 to 25.)

is true. Of course, again, my opinions are not binding upon you and my reason for knowing it is true is because of the meetings and consultations I have had with Stanley. We have been over this many, many times" (T. R. 270a). At the request of the defendant, Cassidy, the testimony concerning the voluntariness of his confession was not heard again before the jury (T. R. 205a).

As with Cassidy, the question of the voluntariness of the defendant's, Johnson, confession was first examined by the court outside the presence of the jury. Chief Dube stated that the defendant, Johnson, was informed of the nature of the crime under investigation and that Johnson was warned as follows:

> "I told him I wanted to ask him some questions as to what he knew of the hold-up and shooting, but before I did ask him these questions, it was my duty to warn him that everything he told me must be truthful, and of his own free will, without any threats or promises having been made to him, and knowing that everything he told me could be used against he or any other person at some future time" (T. R. 184a).

Chief Dube further stated that no promises were made to the defendant and that the defendant was not physically abused or intimidated. The testimony of Chief Dube was substantiated by Detective William Neale (T. R. 191a), Sergeant Conley of the Camden Police Department (T. R. 193a), Detective William Large of the Prosecutor's Office (T. R. 197a), and Mr. Fred Albert, the official court stenographer (T. R. 203a), all of whom stated that no threats, promises, intimidation, physical violence or assault were used.[3]

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[3] Mr. Albert, official court stenographer, who recorded the confession, stenographically, testified that before the confession was given, Chief Dube made the following statement to Johnson:

> ". . . before I ask these questions it is my duty to warn you that everything you tell me must be the truth, must be of your own

The attorney for the defendant, Johnson, presented no evidence on the question of the voluntariness of the confession (T. R. 204a). In his summation, Johnson's attorney alleged that the statement given to Chief Dube was true. He stated, "That statement of Johnson was truthful and honest, because when that was finished, that was the end of it" (T. R. 293a). He further stated, "There were no threats, there was no attempt to evade, there was no trickery" (T. R. 295a).

Both defendants were found guilty of murder without a recommendation of life imprisonment. The death sentence followed automatically.[4] The convictions were confirmed on appeal by the New Jersey Supreme Court (31 N. J. 489, 158 A. 2d 11 (1960)). On the appeal, no assertion was made that the confessions of Johnson and Cassidy were involuntary.

On motion for a new trial, Johnson and Cassidy alleged for the first time that their confessions were involuntary. Testimony was heard by the trial court and the relief sought was denied, 63 N. J. Super. 16, 163 A. 2d 593 (1960). On review, the New Jersey Supreme Court, after a full examination of the record, concluded the evidence proffered by Johnson and Cassidy was untrue, and the trial court's de-

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free will, without any threats or promises having been made to you, and knowing anything you tell me can be used against you, or any other person, at some future time. Do you understand what I have said to you?

A. Yes, sir.

Q. Under those circumstances are you willing to answer my questions?

A. Yes." (NJ/JA 555a-33 to 556a-10.)

[4] N. J. Statute R. S. 2A:113-4, provides:

"Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed."

cision was affirmed, 34 N. J. 212, 168 A. 2d 1 (1961). This court refused certiorari, 368 U. S. 933, 7 L. Ed. 2d 195 (1961).

After the denial of the motion for a new trial, the defendants filed a habeas corpus action in the Federal Court where the question of the voluntariness of their confessions was again reviewed on the merits and relief denied.[5] *U. S. ex rel. Johnson v. Yeager,* 327 F. 2d 311 (3rd Cir. 1964); certiorari denied, 377 U. S. 984, 12 L. Ed. 2d 751 (1964); *U. S. ex rel. Johnson v. Yeager,* 327 F. 2d 320 (3rd Cir. 1964).

Petitioners are now before this Court on review of an application for post-conviction relief. The New Jersey trial court refused the defendants' request for a new evidentiary hearing. On appeal to the New Jersey Supreme Court, defendants, for the first time, some six years after their trial, submitted affidavits alleging a denial of a request for counsel during the police interrogation. The New Jersey Supreme Court considered the affidavits as if they were previously offered for the trial court's consideration. *State v. Johnson,* 43 N. J. 572 at 578, 206 A. 2d 737 (1965). The original petition for post-conviction relief was not supported by any affidavits (T. R. 12a). The petition was silent as to the State's denial of the request for counsel. Indeed attorney for petitioners, at oral argument, on the petition conceded the petition omitted this fact (T. R. 26a-27a).

The New Jersey Supreme Court refused to rehear the issue of voluntariness as that issue had been fully litigated and decided against the defendants on a prior motion for new trial (T. R. 346a-347a). The Court held that, apart from the issue of voluntariness, the alleged denial of an opportunity to consult with counsel where the issue was raised on collateral attack. Ibid., 43 N. J. 572 (1965).

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[5] U. S. District refused habeas corpus in unreported Opinion.

SUMMARY OF ARGUMENT.

The question of the voluntariness of the defendants' confessions, having been fully considered by the New Jersey courts on a motion prior to the present application, should not be reconsidered at this time. The petitioners were represented by counsel at the original trial where they had the right to try the issue of voluntariness, but declined to do so. An appeal was taken from the trial to the New Jersey Supreme Court, and the defendants again failed to raise the issue. The New Jersey Supreme Court later permitted a motion for a new trial at which testimony was heard on the trial level on the question of voluntariness at which time the trial judge, after considering petitioners' testimony, declared they had "conjured up a theory which lacks all basis in fact." *State v. Johnson,* 63 N. J. Super. 16, 38, 163 A. 2d 593 (Law. Div. 1960). The testimony was reviewed by the New Jersey Supreme Court and the confessions were found to be voluntary. The denial of a request for counsel or a failure to warn the accused of his rights were factors to be considered on the question of voluntariness, but were never raised.

The petitioners were represented by counsel at every stage of the trial, the appeal from the trial, the motion for a new trial, and the appeal from that motion. The petitioners, in their present application for post-conviction relief, asked the New Jersey Supreme Court, on appeal from the trial court, to consider the voluntariness of their confessions afresh. The petitioners were not handicapped by lack of counsel, or lack of a transcript in presenting their past attack on the voluntariness of their confessions. There was no justification for the New Jersey courts to hear over and over again an issue which had been finally determined.

The first time the allegation was made that the petitioners were denied their request to consult with counsel, before confessing, was by way of affidavit seeking post-conviction relief from the New Jersey Supreme Court. The affidavits were not accepted by the court as relevant to the question of voluntariness as that question had been decided by a prior proceeding. The evidence of the psychological background of the defendants has never been presented to any New Jersey court and never proven in any court, and should not be entertained by this court on review of the State court proceedings.

By the simple expedient of attaching affidavits to their Appellate briefs, petitioners have sought to introduce as "unrefuted," the right to consult with an attorney of their choice. The State emphatically and unequivocally denies these false assertions. Although these affidavits were made while petitioners were in the death house awaiting execution and although they indicate that petitioners were aware that false swearing is a misdemeanor, subject to punishment, the State of New Jersey insists on its right to challenge these "unrefuted" affidavits. An evidentiary hearing was never held to allow rebuttal testimony by the State, vis-a-vis these affidavits. Our New Jersey Supreme Court considered these affidavits, *arguendo,* and assumed that petitioners' allegations were within the principles announced by *Escobedo* (an assumption they considered unsound). The Court went on to dispose of this issue by refusing retroactive application of this issue (Ibid., 43 N. J. 572).

The interrogation of both of the petitioners by the police were within the constitutional boundaries outlined in *Escobedo v. Illinois.* Prior to asking any questions, the police warned the petitioners of the nature of the inquiry, that any answers must be of their own free will and that anything said could be used against them. By implication this warning includes the right to remain silent.

The holding of *Escobedo* should not be extended to require the State to offer and furnish counsel when not requested. Even if the alleged refusal to supply counsel for the accused during interrogation is a violation of the Constitutional right, such a rule should not be applied retroactively.

ARGUMENT.

Point I.

A.

The interrogation of petitioners was within the constitutional boundaries outlined in Escobedo v. Illinois.

Two theories exist for the exclusion of confessions from the trial of criminal cases. At common law a coerced confession was excluded because it might be false. Wigmore Evidence (3rd Ed. 1940), Vol. 3 Sec. 815. Such was the theory in *Brown v. Mississippi,* 297 U. S. 278 (1936), where the court was concerned with a fair trial. In another early confession case, Justice Roberts wrote:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt." *Lisenba v. California,* 314 U. S. 219, 236 (1941).

Under the second theory, a confession may be inadmissible without consideration for its probable falsity, if it is obtained through gross and abusive police methods.

As Justice Frankfurter stated:

> "In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken." *Watts v. Indiana,* 338 U. S. 49, 55 (1949).

In *Escobedo,* the court was obviously concerned with the technique used by the police to get a confession from the accused. The physical restraint of his attorney from consulting with him was designed to bar the accused from gaining knowledge of his constitutional rights. The conduct of the State official was reprehensible and merited censorship. Further, the court found, that considering the whole context of the interrogation, the resulting confession which was introduced at the trial of accused vitiated the conviction. Escobedo was a young immigrant with only scant knowledge of the English language, and with no exposure to the rudimentary constitutional principles with which every American has at least some familiarity through history, magazines, books and movies.

The heart of the matter was the problem of an accused making a self-incriminating statement to the police, where the accused was unaware of his constitutional right not to do so, and where the police actively prevented him from gaining knowledge of his rights. As the court stated it:

> "We have also learned the companion lesson of history that no system of criminal justice can, or should,

> survive, if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." *Escobedo*, at page 490.

Conceding that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence and conceding that an accused will often make a confession because he is unaware of his constitutional right to remain silent, it does not follow that where there is a denial of a request by an accused that he be permitted to consult with counsel during interrogation, that a resulting confession is coerced or that it was made in ignorance of constitutional rights.

Police interrogation is not inherently evil and contrary to the principles of the Constitution of the United States, if counsel is not present during the questioning. As Dean Pound stated:

> "Immunity of accused persons from all interrogation, if they are firm, well-advised and able to give bail, is the most effective shield of wrongdoers." The Spirit of Common Law, page 104 (Beacon Press, 1963).

Of course, if counsel is present during interrogation, this court will never have to decide whether a confession was coerced or the accused had knowledge of his constitutional rights. Requirement of counsel at all interrogations is equivalent to an immunity from interrogation. In the words of Justice Jackson:

> "Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statements to police under any circumstance." *Watts v. Indiana*, 338 U. S. 49, 59.

Crooker[6] held, and *Escobedo* re-emphasized, that an accused may be informed of his constitutional rights by the authorities, id., 491, or he may be aware of them through education, id., 492. Neither *Crooker* nor *Escobedo* establishes an absolute rule that every state's denial of a request for counsel during interrogation is an infringement of a constitutional right without regard to the circumstances of the case.

In the instant case, both defendants were informed of their rights by the police authorities.

Before the interrogation, Chief Dube instructed Cassidy as follows:

> "I am going to ask you some question as to what you know about the holdup, but before I ask you these questions, it is my duty to warn you that everything you tell me must be of your own free will, must be the truth, and without any promises or threats made to you, and knowing anything you tell me can be used against you, or any other person, at some future time."[7]

Though the warning was not prefixed with any statement concerning the Constitution, the content fairly apprised the defendant of his rights. He was informed that the questioning would be directed at a hold-up, that any statement must be of the defendant's free will, and that anything the defendant said could be used against him.

Chief Dube, Sergeant Conley, Captain Large and Mr. Fred Albert, the official Court Stenographer, stated that no threats, promises, physical violence or assault was used in obtaining the statement from Cassidy.

The interrogation of Johnson was conducted in the same

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[6] **Crooker v. California,** 357 U. S. 433 (1958).

[7] See footnotes #1 and #2 for the record of Chief Dube's warning, which was made contemporaneously with the taking of the statement.

manner. Chief Dube stated that he warned Johnson as follows:

> "I told him I wanted to ask him some questions as to what he knew of the hold-up and shooting, but before I did ask him those questions, it was my duty to warn him that everything he told me must be truthful, and of his own free will, without any threats or promises having been made to him, and knowing that everything he told me could be used against he (sic) or any other person at some future time."

Chief Dube, Sergeant Conley, Detective Large and Mr. Fred Albert, the official Court Stenographer, all testified that no threats, promises, intimidation, physical violence or assault were used to obtain the statement from Johnson.[8]

Neither of these cases demonstrate gross or abusive police conduct, nor do we find in either interrogation the police taking advantage of the accused's ignorance of constitutional rights. The defendant was informed of his right not to speak unless of his own free will and of the danger that any statement which he might make could be used against him. Even if the alleged denial of counsel during interrogation is taken at face value, the defendants were adequately informed of their rights, and the denial of counsel should not vitiate their confessions.

The first time the defendants ever raised the alleged denial of requested counsel in the New Jersey courts was five years after their conviction, though the denial of counsel is a factor to be considered on the question of voluntariness in New Jersey. *State v. Johnson,* 43 N. J. 572, 206 A. 2d 737 (1965); *State v. Naglee,* 44 N. J. 209, 207 A. 2d 689 (1965); *State v. Puchalski,* 45 N. J. 97, 211 A. 2d 370 (1965).

The fact could have been raised during a hearing on the

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[8] See footnotes #1 and #2 for the record of Chief Dube's warning, which was made contemporaneously with the taking of the statement.

voluntariness of the confession during the initial trial back in 1959. The defendants never mentioned it, though the hearing was held out of the presence of the jury. The fact could have been raised again back in 1960 during a hearing for a new trial when the voluntariness of the defendants' confessions was again reviewed. The defendants never mentioned it. The first time any mention of a denial of counsel was made in the New Jersey court was on the present application for post-conviction relief.

The voluntariness of the defendants' confessions was reviewed in a prior action on the merits by the New Jersey Supreme Court in 1961. *State v. Johnson,* 34 N. J. 212, 168 A. 2d 1 (1961), cert. den. 368 U. S. 933 (1961).

In 1963 the United States Court of Appeals for the Third Circuit reviewed the question of the voluntariness of the defendants' confessions on the merits and again the defendants did not allege denial of counsel. (Relief was denied, 327 F. 2d 31 and 327 F. 2d 320 (1964).)

If this court should decide that counsel for the accused must be present at all police interrogation, it will be discarding completely what it has previously recognized as a value, interrogation of the accused as part of police investigatory procedure as little as one year before *Escobedo,* there was no question that the interrogation of an accused by the police was considered of value to society. *Haynes v. Washington,* 373 U. S. 503, 515 (1963).

The standard that has been applied over the years in determining whether the value of the constitutional right to remain silent outweighed the value to society of the police interrogation of an accused was one of voluntariness. To require that counsel be present during all police interrogation of an accused would, in effect, do away with the striking of this balance, for the lawyer in the American judicial system is concerned not with society's problems in solving

crimes; his duty is to protect his client, guilty or innocent. *Watts v. Indiana,* supra, 338 U. S. at 59.

The lawyer will not only instruct his client in his constitutional right, he will direct him in the manner in which the rights shall be exercised which, in effect, will mean there will be no police interrogation.

Under existing New Jersey law, the absence of counsel at police interrogation and the failure of the police to warn the defendant of his right to remain silent, is a fact to be taken into consideration in determining whether a confession should be admitted into evidence. *State v. Johnson,* supra, 43 N. J. 572, at 578. *State v. Puchalski,* supra; *State v. Naglee,* supra. The admissibility of the confession depends on the balance struck after weighing the competing values: the right to remain silent, the value to society of police interrogation, and the integrity of the judicial process. This is the test that was applied in *Crooker v. California,* 357 U. S. 433 (1958), and was the test that was applicable when the defendants in this case were tried in 1959.

A rule which would exclude all pretrial statements made in the absence of counsel, is unnecessary to prevent police coercion and the violation of an accused's right to remain silent. *Crooker* recognized this and *Escobedo* suggested it. The police can, as they did in this case, warn the accused that the statements must be made freely and that anything the accused might say can be used against him. The introduction of counsel at the interrogation would do nothing to prevent the accused from making a statement which he would otherwise be willing to make.

There can be no question that counsel would be of value to the accused during the interrogation. Counsel is of value at any time that an individual must deal with state officials, but the question remains is the individual's right to counsel during interrogation of higher value to society than the continuance of the police procedure of interrogating criminals?

It is submitted that the choice between interrogation and no interrogation, need not be made, whereas here, the defendant is warned in clear layman's language that his statement must be of his own free will and what he says may be used against him. He is adequately equipped to make a determination for himself whether he should speak or not.

Escobedo is not applicable to the facts in this case. In *Escobedo* the defendant had retained a lawyer and had requested the opportunity to talk with him, which was denied. In the instant case, neither defendant had retained a lawyer. In *Escobedo* the defendant's lawyer was not permitted to consult with his client. Here, neither defendant had retained a lawyer. In *Escobedo,* defendant was a foreigner, with little or no exposure to basic constitutional principles. Here, both defendants were native-born and exposed to the American educational system, literature, movies, T.V., radio and newspapers. In *Escobedo* the defendant received no warning from the police that his statement could be used against him. Here, both defendants were instructed that their statements must be of their free will and that their statements could be used against them.

There is no evidence here of the wholly evil practice of the use of the third degree, physical or psychological. The officials did not carry on any lawless practice; they conducted themselves within the guidelines established by this court.

B.

The principle of Escobedo v. Illinois should not be held to be retroactive.

Unlike *Gideon v. Wainwright,* 372 U. S. 335 (1963), where the defendant could not raise his constitutional rights at trial or an appeal to the State Courts because of his lack of

counsel to instruct him in the proper procedure; and unlike *Griffin v. Illinois,* 351 U. S. 12 (1956), where the defendant was not permitted to appeal from a conviction due to his lack of funds, in the instant cases, both petitioners were represented by counsel at all stages of their trials, and their subsequent appeals. At all the proceedings before the New Jersey and Federal courts, they were permitted free transcripts and whatever resources were required to have their cases thoroughly reviewed.

Where a criminal defendant has been denied the resources and instruction necessary for a full and proper review of his case, it is only fair to permit him to raise his constitutional issue by way of collateral attack. But where convictions were rendered, appeals exhausted, and certiorari denied, and where the issues which petitioners seek to raise by collateral attack were reviewed on direct appeal, the prior decision of the court should be final. See *United States v. Sobell,* 314 F. 2d 314 (2nd Cir. 1963), cert. den. 374 U. S. 857 (1963), where the court held that an overruling decision of this court should not be applied retroactively on a collateral attack via a habeas corpus petition so as to upset a previously valid judgment. The *Escobedo* decision is far removed from those cases where new constitutional principles were applied retroactively. Retroactivity of new constitutional rules were granted only in instances where the alleged violation of the defendants' rights deprived them of a fair opportunity to litigate the question of their guilt or innocence. Similarly the coerced confession cases were held retroactive because these confessions were potentially unreliable and could result in conviction of an innocent defendant. *Reck v. Pate,* 367 U. S. 433 (1961); *Fay v. Noia,* 372 U. S. 391 (1963). But here, the admissibility and reliability of Cassidy's and Johnson's confessions were not attacked at their trial. Indeed, both of their attorneys argued to the jury that the confessions were true

and that the jury should accept the facts stated therein in mitigation of the offenses. This is not a conviction based on a probable or even a possible false confession, and this Court is not faced with the problem of determining whether the procedure used by the police may have led to the conviction of an innocent man.

Linkletter v. Walker, 381 U. S. 618 (1964); *Angelet v. Fay,* 381 U. S. 654 (1965) and *Tehan v. Shott,* 34 U. S. L. Week 4095 (1965), clearly establish that not every violation of a constitutional right will support a collateral attack on a final judgment of conviction. In *Linkletter,* the court stated, after reviewing the history and theory of retroactivity, that while a case is on direct review a change in the law will be given effect, but on collateral attack there is no settled principle of retroactive invalidity. It depends "upon a consideration of 'particular relations . . . and particular conduct . . .; of rights claimed to have become vested, of status of prior determinations deemed to have finality'; and 'of public policy,' " Supra, at p. 627. The Court then stated:

> "Once the premise is accepted that we are neither required to apply nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Supra, at p. 629.

The Supreme Court of New Jersey considered the above factors in deciding that *Escobedo* should not be retroactively applied, when it declared:

> "Where the reliability of the guilt-determining process is seriously impugned, there is good reason for applying the new rule to a case already decided. It would offend our sense of justice to continue to incarcerate a convicted man where subsequent considera-

> tions cast grave doubts upon the reliability of the determination of his guilt. But where the conviction was obtained as a result of a procedure not considered fundamentally unfair at that time and subsequent judicial decisions cast no substantial doubts upon the reliability of the determination already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal.
>
> " . . . Unlike Gideon, the rule of law which the defendants contend Escobedo announces does not raise substantial doubt as to the reliability of the determination of guilt. Therefore, we will not apply that rule to the prior convictions (here) . . ." *State v. Johnson,* 43 N. J. at 585, 587.

The same factors which prompted this Court to hold *Mapp* non-retroactive, in *Linkletter* and *Griffin v. California,* 380 U. S. 609 (1965), and *Tehan,* supra, are involved when dealing with the issue of the retroactivity of *Escobedo.* As with *Mapp* and *Griffin,* (1) the purpose of the *Escobedo* rule would not be served by its retroactive application, (2) the state courts justifiably relied on the pre-*Escobedo* "voluntariness" doctrine, (3) the *Escobedo* decision does not impugn the fairness of the trial, (4) the retroactive application of *Escobedo* would have a catastrophic effect on the administration of justice. *Tehan v. Shott,* supra, considered these criterion. To the extent that the above circumstances are present in both situations, *Linkletter* and *Tehan* must be considered authoritative, vis-a-vis, the retroactivity of *Escobedo.* Since the *Escobedo* decision does not cast doubt on the integrity of the fact finding process, our "deepest sentiments of justice" are not offended and therefore justice would not be served by giving it retroactive application.

Prior to *Escobedo,* the mere failure to advise a suspect of

his right to counsel and his right to remain silent would not of itself prohibit the use of any statement made by the accused. In *Cicenia v. Legay,* 357 U. S. 504 (1958), and *Crooker v. California,* 357 U. S. 433 (1958), confessions were held admissible though obtained after a requested opportunity to consult with counsel was denied. The language of *Escobedo* is directed more to the danger to society than to the danger of an unjust conviction. The court stated in *Escobedo:*

> "No system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." 378 U. S. 478, 490.

The purpose of *Escobedo* was to deter police interrogation of a suspect without counsel so as to prevent unwary self-incrimination. See *Walden v. Pate,* F. 2d , 34 U. S. L. Week 2065 (1965). The court was addressing itself to the problem of reforming a system. A retroactive application of the principles of *Escobedo* is unnecessary for purposes of reform, but it would place a tremendous strain on a presently overburdened criminal system and would seriously disrupt the administration of justice. This court recognized the possibility of this in *Linkletter,* when it declared:

> "Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hear-

> ings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

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

> "Until Escobedo, it had never been seriously urged that the mere failure to advise a suspect of his right to remain silent and his right to counsel would of itself, absent other factors evidencing unfairness or coercion, invalidate the use of any statement made thereafter by the accused." *United States v. Cone* (2nd Cir. 1965), decided November 22, 1965.

Unquestionably, with the passage of many years, perhaps even decades, retroactive application of *Escobedo* would cause tremendous chaos. With the passage of time, court transcripts and other relevant and necessary records may no longer be available; memories become inaccurate and witnesses may no longer be available, all of which factors aid the multitudinous defendants. See *Tehan v. Shott,* supra at 4099; *Linkletter v. Walker,* supra, 637-638; *U. S. ex rel. Angelet v. Fay,* 381 U. S. 65 (1965); *U. S. v. Sobell,* 314 F. 2d 314, 325 (2nd Cir.), cert. den. 374 U. S. 857 (1963).

For the foregoing reasons, the purposes of the *Escobedo* decision would not be served by permitting final judgments of state courts to be reopened and collaterally attacked many years after their rendition.

Point II.

Recent pronouncements by this court refused to apply retrospectively the decision of Griffin v. California.

This court, in *Tehan v. Shott,* 34 U. S. Law Week 4095 (January 19, 1966), refused to allow *Griffin v. California* retrospective application. This opinion succinctly moots petitioners' present argument.

The State of New Jersey has been informed by petitioners' counsel that in view of the aforesaid opinion they have abandoned the presentation of this issue.

Point III.

The mere fact that Wayne Godfrey's confession was found to be involuntary by the Circuit Court of Appeals does not require a reversal of petitioners' case.

Although the Third Circuit Court of Appeals held the confession of Wayne Godfrey involuntary, it nevertheless found petitioners Johnson and Cassidy's confessions to be voluntary. *United States, ex rel. Johnson v. Yeager,* 327 F. 2d 316, 319 (3rd Cir. 1964). Petitioners now argue that Godfrey's confession inspired petitioners to confess, and since Godfrey's confession has been held to have been involuntary, petitioners' confessions are involuntary.

The bald assertions that Johnson's confession was induced by his knowledge that Godfrey and Cassidy had already confessed and had identified him as the killer, is an unwarranted factual assumption. Furthermore, the contention that Godfrey's oral admission and presence induced Cassidy to confess is not bottomed on fact. It is, at best, conjecture

of counsel. The affidavits of Cassidy and Johnson, assuming their veracity, in no way indicates Godfrey's confession induced petitioners' confessions.

This point was considered and disposed of adversely to these petitioners by the same court that voided the Godfrey confession, when it stated:

> "Finding only Godfrey's confession to have been involuntary on the record before us, we have considered whether the admission of that confession itself affected the constitutional rights of Cassidy and Johnson. The introduction of a coerced confession in evidence against one defendant is not in itself the imposition of constitutional wrong upon his co-defendant. Stein v. New York, supra, 346 U. S. 156 at 194-196, 73 S. Ct. 1077 at 1097-1098, 97 L. Ed. 1522; Malinski v. New York, supra, 324 U. S. 401, at 410-412, 65 S. Ct. 781, at 786, 89 L. Ed. 1029. The jury was instructed to consider each confession as evidence against its maker only. And here we have the additional consideration that substantially the same information was placed before the jury in the confessions of Cassidy and Johnson as in the confession of Godfrey. In these circumstances, we think it is not reasonable to believe that the jury would or, indeed, had any occasion to go beyond Cassidy's and Johnson's own confessions and use similar statements in Godfrey's confession against them." *United States, ex rel. Johnson v. Yeager,* 327 F. 2d 311, 318-19 (3rd Cir. 1964), cert. denied as to Johnson and Cassidy, 377 U. S. 984; cert. denied as to Godfrey, 377 U. S. 977 (1964).

The New Jersey Supreme Court came to the same conclusion for the same reason. *State v. Johnson,* 43 N. J. 594, 206 A. 2d 737, 748-749 (1965).

In *Malinski v. New York,* 324 U. S. 401 (1945), the court, in a similar case, stated:

> "The furtherest we have gone in a comparable case from a State Court is to vacate the judgment against the co-defendant who did not confess and remand the case to the State Court for further consideration. Thus, in Ashcraft v. Tennessee, 332 U. S. 143 (1944), we followed that procedure at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the State Court on the assumption that the confession which we held to be coerced was properly admitted and that the conviction of the defendant who did confess was valid."

In the case, *sub judice,* neither the trial court nor the New Jersey Supreme Court based its finding of voluntariness of petitioners' confessions on the assumption that co-defendant Wayne Godfrey's confession was valid. Both petitioners independently made voluntary confessions acknowledging their own participation in the crime.

Assuming, arguendo, the truth of petitioners' affidavits; and assuming further, that Godfrey's statements, as used by the police, were a factor in causing Johnson and Cassidy to confess, nevertheless, we submit that the constitutional rights of Johnson and Cassidy were not violated. This is not a case where a petitioner's involuntary statement has led to other evidence which is introduced at trial against *him.* See, e.g. *Wong Sun v. United States,* 371 U. S. 471, 487-488, 83 S. Ct. 407; 9 L. Ed. 2d 441, 455 (1963); Cf. *Trilling v. United States,* 104 U. S. App. D. C. 159, 260 F. 2d 677, 694 (D. C. Cir. 1958); *Jackson v. United States,* 106 U. S. App. D. C. 396, 273 F. 2d 521 (D. C. Cir. 1959); *Fahy v. Connecticut,* 375 U. S. 85, 91 (1963) (cited by petitioners, falls within the above category of cases). Here, the alleged coercion which was held to force Godfrey's confession was in violation of *his* constitutional rights and precluded its

introduction of illegally seized evidence against one who was not the victim of the seizure, have consistently held that that person cannot assert the denial of another's rights. See *Wong Sun v. United States,* supra, 371 U. S., at p. 492, 83 S. Ct., at p. 419, 9 L. Ed. 2d at p. 458; *State v. Nobles,* 79 N. J. Super. 442 (App. Div. 1963). Cf. *Goldstein v. United States,* 316 U. S. 114, 62 S. Ct., 1000, 86 L. Ed. 1312 (1942).

Point IV.

No error was committed by the trial judge in refusing to grant a severance.

In New Jersey, the granting of a motion for a severance is discretionary with the trial court. R. R. 3:5-7. This Rule is declaratory of the long-settled practice in this state, *State v. Rios,* 17 N. J. 572, 112 A. 2d 247 (1955); *State v. Manney,* 26 N. J. 362, 140 A. 2d 70 (1958), and denial of such a motion will not be reversed in the absence of a clear showing of mistaken exercise of discretion. *State v. Rios,* supra; *State v. Hall,* 55 N. J. Super. 441, 151 A. 2d 1 (App. Div. 1959); *State v. Yedwab,* 43 N. J. Super. 367, 128 A. 2d 711 (App. Div. 1957); *State v. Rosenberg,* 37 N. J. Super. 195, 117 A. 2d 168 (App. Div. 1955). The ultimate inquiry for the trial judge in passing upon such motions is whether a jury is likely to be unable to comply with the court's limiting instruction, *State v. Tassiello,* 39 N. J. 282, 188 A. 2d 406 (1963), and a claim of prejudice grounded upon the prospect that some evidence will be admissible only as to one defendant, does not require a severance as a matter of right. *State v. Manney,* supra. Respectable authority indicates that a defendant's confession inculpating a co-defendant may be admitted in a joint trial solely against the declarant, under appropriate instructions. *Delli Paoli*

v. United States, 352 U. S. 232 (1957); *State v. Stanford,* 90 N. J. L. 724, 101 A. 53 (E. & A. 1917); *State v. Unger,* 93 N. J. L. 50, 53, 107 A. 270 (Sup. Ct. 1919), reversed on other grounds, 94 N. J. L. 495 (E. & A. 1920); *State v. Newman,* 95 N. J. L. 280, 281, 113 A. 225 (Sup. Ct. 1921); 4 Wigmore, Evidence (3rd Ed. 1940), Sec. 1076, pp. 116-117, and Sec. 1079 (1) (d), p. 134. See also Annotation: "Right to Severance where Co-defendant has Incriminated Himself," 54 A. L. R. 2d 830, 833 (1957).

The trial court's refusal to order a severance and the subsequent introduction of petitioners' confessions did not violate petitioners' constitutional rights. As pointed out by the New Jersey Supreme Court, *State v. Johson,* 31 N. J. 489, 506 (1960), all the petitioners confessed and all the confessions were also in substantial agreement. In their confessions, none of the petitioners attempted to place the onus of the crime on the other petitioners. They all agreed on who did the shooting and the only discrepancy was on the question as to whose mind it was that originated the idea of robbing Davis' toy store. This factually distinguishes *State v. Young,* 46 N. J. 152 (1965), wherein deletion of a confessing defendant's inculpatory statement against a non-confessing co-defendant were not permitted. Separate trials for each defendant would have meant the three-fold production and repetition of all the testimony of numerous doctors, law enforcement officers and other witnesses. On seven distinct occasions, during the trial and in his charge, the trial judge gave specific cautionary instructions to the jury on the limited effect to be given the confessions. On this basis our New Jersey Supreme Court concluded that the trial judge did not abuse his discretion in permitting the confessions as offered to be presented to the Jury.

Point V.

The summation of the prosecutor was proper.

A.

Descriptive words were justified by the evidence.

The allegations of the impropriety of the prosecutor's summation has heretofore been decided in the Supreme Court of New Jersey. *State v. Johnson,* 31 N. J. 489, 509, 513, 159 A. 2d 11 (1960). At that time the court determined that the graphic summation of the prosecutor was justified by the evidence. The court declared:

> "In his summation, the prosecutor described the crime and the roles taken by the defendants in it. He characterized the defendants collectively as killers, robbers, strong-arm men, and gunmen, and described individual defendants as 'triggerman,' 'ring leader,' 'conniving fingerman,' and the like. We can see nothing in these words that violated the defendants' rights. There was no suggestion by the defendants that the account of the crime contained in the confessions was inaccurate. The prosecutor's description may have been graphic, but it was not unjustified by the evidence. State v. Cioffe, 128 N. J. L. 342 (Sup. Ct. 1942), affirmed per curiam, 130 N. J. L. 160 (E. & A. 1943); State v. Lang, supra. Cf. State v. Siciliano, supra."

This matter was again considered by the New Jersey Supreme Court which, contrary to petitioners' assertions, considered the alleged deprivation of petitioner's constitutional rights. In declaring it was satisfied that petitioners' rights

to a full and fair trial were not denied by the prosecutor's summation, the court opined:

> "The defendants finally contend that the prosecutor's summation to the jury was so inflammatory that it deprived them of *due process of law*. The character of the prosecutor's remarks were fully considered by this court on the defendants' direct appeal and we were completely satisfied that the defendants' right to a full and fair trial was not denied." *State v. Johnson*, 43 N. J. 572, 596, 206 A. 2d 737, 750 (1965). (Emphasis added.)

B.

Prosecutor did not argue for death penalty as a deterrent to others.

Petitioners further contend (Point V) that the prosecutor argued extensively on summation that petitioners should be executed to deter future crime.

Petitioners, during their trial, made no issue of their guilt. Indeed, their attorneys told the jury that petitioners were guilty of the crime with which they were charged. The sole thrust of the defense was to persuade the jury to recommend life imprisonment as opposed to the death penalty.

Petitioners' trial counsel initiated comment concerning the deterrent effects of the death penalty. Counsel for petitioners repeatedly called the jury's attention to the fact that capital punishment is not a deterrent to crime (NJ/JA 266a-267a; NJ/JA 298a-299a). Assuming, arguendo, the prosecutor did argue the deterrent effect of capital punishment, such argument would have been responsive to petitioners' counsels' pleas. The prosecutor invoked the use of the word "deterrent" in the context that it is one of philoso-

phies supporting the concept of punishment and he did not indicate that the death penalty is a deterrent. The prosecutor's mild reference to the word "deterrent" was not used in the same context and is in sharp contrast to the state's summation in *People v. Love,* 56 Cal. 2d 720, 731, 366 P. 2d 33, 39 (1961). In *Love,* the prosecutor stated as a fact the proposition that capital punishment is a more effective deterrent than imprisonment. The gist of *Love* is that an appeal based upon the alleged superiority of capital punishment over imprisonment reaches into improbable and unknown areas. See *People v. Ketchel,* 59 Cal. 2d 503, 381 P. 2d 394 (1963).

Viewing the state's summation in its entirety, it becomes apparent that the prosecutor's comments did not adversely affect petitioners' rights to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.

Point VI.

The alleged delay in arraignment does not invalidate the confessions.

The fact that the defendant is over-detained before arraignment in a state proceeding does not invalidate the confession obtained in the interim. While it is the rule in federal prosecutions that confessions obtained in these circumstances must be suppressed, *Mallory v. United States,* 354 U. S. 449 (1957); *McNabb v. United States,* 318 U. S. 332 (1943), this exclusionary rule is a function of the supervisory power of the federal courts over federal prosecution. *Culombe v. Connecticut,* 367 U. S. 568 (1961); *Stroble v. California,* 343 U. S. 181, 197 (1952); *Gallegos v. Nebraska,* 342 U. S. 55 (1951).

Although petitioners seek to raise *McNabb* to the dimen-

sions of a constitutional interdiction, this court has heretofore held that the Fourteenth Amendment does not prohibit a state from such detention and examination of a suspect, but for which, all the other circumstances, is found not to be coercive. The *McNabb-Mallory* rule does not rise to the dignity of a constitutional prohibition. *Culombe v. Connecticut*, supra.

Moreover, even if this court should declare the *McNabb-Mallory* rule applicable to the states, since that rule is not predicated upon the issue of the unreliability of the evidence obtained during illegal detention, the rule should not be applied to the trial of this case which occurred in January, 1959. See Respondent's discussion under similar application of *Escobedo* (Point I).

CONCLUSION.

On the basis of the aforesaid law and arguments, the State respectfully submits that the defendants, Johnson and Cassidy received a fair and impartial trial and that the convictions should be affirmed.

Respectfully submitted,

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