IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

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

BRIEF FOR RESPONDENT

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OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS INVOLVED.

Pursuant to Rule 40, Subd. 3, Rules of the Supreme Court, 28 U.S.C. Rules, as amended, the respondent accepts petitioner's presentation of the above referenced portions of the brief.

QUESTION PRESENTED

While your respondent accepts the legal substance of the Question Presented as posed by the petitioner,

serious issue is taken with the descriptive phrases, "poorly educated, mentally abnormal".[1] The propriety of this description of the petitioner, insofar as it may enhance the question presented for review, is no doubt one of the key issues to be decided by the Court and respondent reserves the right to present argument, *infra,* concerning the description's accuracy and impact.

STATEMENT OF THE CASE

Pursuant to Rule 40 of this Court, *supra,* respondent deems it necessary to set forth additional facts from the record of this case which are considered essential to the complete resolution of the issues presented for review.

A psychiatric report is part of the record (R. 6) and has been referred to by petitioner in his Statement of the Case.[2] The totality of this report is essential for an adequate determination of critical factual and background matters, and the report is therefore fully incorporated by reference into this Statement of the Case and reprinted verbatim in Appendix A, *infra.*

The psychiatrist quoted the petitioner as making the following statements:[3]

"Don't worry. If I had wanted to rape you, I would have done it before. [R. 7]

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[1] Brief of Petitioner, at 2.

[2] **Id.** at 3.

[3] These are in addition to those quoted responses to proverbs cited in petitioner's brief, **Id.** n. 1.

"You don't have to scream. I am not going to hurt you. [R. 7]

"I didn't know how to ask her for forgiveness. [R. 7]

"I never could get adjusted to her. [R. 8]"

The psychiatrist sets forth in detail Miranda's experience with law enforcement agencies.[4] (R. 8)

Petitioner made a written statement concerning the events in question (State's Exhibit 1; R. 41, 69). Petitioner makes selected references to the statement.[5] Respondent incorporates the whole of this written instrument into this brief; it is reprinted herein as Appendix B, *infra.*

A portion of the statement was typewritten and part of it was written in long-hand by the petitioner himself (R. 40, 41). The following portion of the statement was actually written by the petitioner in his own hand:

"E.A.M. Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did

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[4] 1) Aged 14, Stolen Car, Probation.
2) Three weeks later, Fort Grant (Arizona Industrial School for Boys), 6 months.
3) Assault and Attempted Rape, 1 year sentence.
4) Aged 17, Peeping Tom charge, Los Angeles, Probation.
5) Arrested twice, Los Angeles, Suspicion of Armed Robbery.
6) Military service, Peeping Tom charge, confinement and Undesirable Discharge.
7) December 1959, Dwyer Act Violation, Federal Penitentiary.

[5] Brief of Petitioner, n. 3.

could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M." (R. 69)

Finally, petitioner cites the Court to the opinion of the Arizona Supreme Court (R. 72-93), but once again is selective in the portions set forth in the Statement of the Case.[6] Acting on the assumption that petitioner considered the selected portions of the opinion "all that is material to the consideration of the Questions Presented",[7] the respondent must expand this Statement of the Case to include the whole of the opinion below of the Arizona Supreme Court (98 Ariz. 18, 401 P. 2d 721) and hereby incorporates the whole of the opinion herein by reference.

The following specific excerpts, at a minimum, are vital for a determination of the factual and legal predicate of the Arizona Court in its resolution of the Federal Constitutional Question:

"The question of whether the investigation had focused on the accused at the time of the making of the statement and thereby shifted 'from investigatory to accusatory' is not the deciding factor in regard to the admissibility of the confession in the instant case. There are other factors under the ruling of the Escobedo case. Defendant in the instant case was advised of his rights. He had not requested counsel, and had not been denied assistance of counsel. We further call attention to the fact that, as

[6] Id. at 5-6.

[7] Rule 40, Subd. 1 (e), Supreme Court Rules, 28 U.S.C., Rules, as amended.

pointed out in the companion case here on appeal, State v. Miranda, No. 1397 [98 Ariz. 11, 401 P. 2d 716] defendant had a record which indicated he was not without courtroom experience. [Citation omitted] It included being arrested in California on suspicion of armed robbery, and a conviction and sentence in Tennessee on violations of the Dwyer [sic] Act. Under the circumstances he was certainly not unfamiliar with legal proceedings and his rights in court. The police testified they had informed defendant of his rights, and he stated in his written confession that he understood his rights (which would certainly include his right to counsel), and it is not for this court to dispute his statement that he did. His experience under previous cases would indicate that his statement that he understood his rights was true. (R. 88-89)

* * *

"What is the purpose of the right to counsel? What is the purpose of the Sixth and Fourteenth Amendments? Without question it is to protect individual rights which we cherish, but there must be a balance between the competing interests of society and the rights of the individual. Society has the right of protection against those who roam the streets for the purpose of violating the law, but that protection must not be at the expense of the rights of the individual guaranteed under the Sixth and Fourteenth Amendments to our Constitution. (R. 91-92)

* * *

"It will be noted in the discussion of these cases—particularly the Escobedo case—the ruling of the court is based upon the circumstances of the particular case. The court, in making its holding in the Escobedo case, stated 'under the circumstances here the accused must be permitted to consult with his lawyer.'

"Most of the cases distinguished the Escobedo case on the grounds that the defendant requested and was denied the right to counsel during interrogation. The Escobedo case merely points out factors under which —if all exist—it would not be admissible. We hold that a confession may be admissible when made without an attorney if it is voluntary and does not violate the constitutional rights of the defendant.

"Each case must largely turn upon its own facts, and the court must examine all the circumstances surrounding the taking of the statement in determining whether it is voluntary and whether defendant's constitutional rights have been violated.

"The facts and circumstances in the instant case show that the statement was voluntary, made by defendant of his own free will, that no threats or use of force or coercion or promise of immunity were made; and that he understood his legal rights and the statement might be used against him. Under such facts and circumstances we hold that, notwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence." (R. 92-93)

SUMMARY OF ARGUMENT

Petitioner was in no way denied his constitutional right to counsel in this case. He neither merits, nor is he reason for, the pronouncement of the broad constitutional principle which is sought.

Petitioner received a full elementary education and, although he had an emotional illness, he had sufficient mentality and emotional stability to understand what

he was doing when he was doing it, and to fully appreciate all the potential consequences of his act.

Clearly there was no police brutality or any possible official overreaching in the acquisition of the statements here in question. Yet petitioner, nonetheless, portrays the police generally in the worst possible light, in attempting to justify the need for the rule he seeks. The examples of bad police activity represent the exceptions to the general rule as regards police conduct and attitude, and do not merit or require an overly broad constitutional rule which would strike down the good with the bad.

Petitioner infers that since he stood no chance of victory in the trial of the case after the statements were given, he was therefore deprived of some right. Nothing could be further from the truth. He has no such right to "win". The Constitution insures that he must not be convicted as a result of any violations of those rights which we all cherish; it doesn't insure that he won't be convicted.

The decision of the Arizona Supreme Court below rested on many factors, of which the lack of a request for counsel was but one. It determined that the totality of these factors did not result in affirmative conduct which denied petitioner his right to counsel. There was no element of waiver involved in the Arizona Court's decision.

The decision of this Court in *Escobedo v. Illinois,* 378 U.S. 478 (1964) does not require the reversal of this case. The facts are significantly different. The legal

principles therein announced, considered within the context of that decision as it discusses not only the particular facts of the case but also the significance of the prior decisions of this Court on the same subject matter, implement an exclusionary rule directed to deter the police from affirmative conduct calculated, under the facts of any given case, to deny an accused from consulting with counsel. Such a rule, in proper perspective and balance, will protect the accused from any infringement of his right to counsel, while not unduly or unnecessarily curtailing the oft times essential investigative questioning of a suspect.

ARGUMENT

I

INTRODUCTION

Petitioner states that his life for all practical purposes was over when he walked out of Interrogation Room #2 on March 13, 1963.[8] The real fact is that Miranda's life was unalterably destined ten days earlier during the late evening hours of March 2 and the early morning hours of March 3, when he kidnapped and raped his victim, Patricia Wier. What followed must not be described in cynical terms as "the ceremonies of the law";[9] they were, and are, the carefully ordained processes of our judicial system, designed, at the optimum, to discover the truth, mete out justice to all, insure the guilty their just and proper recompense and vindicate the innocent. To be sure,

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[8] Brief of Petitioner, at 10.

[9] Ibid.

thoroughly interwoven into these processes at all stages and levels is the implementation and zealous protection of those cherished rights and privileges guaranteed to all by the Constitutions of the United States and the several states; no police officer, prosecutor or judge dedicated to the basic precepts of our system of government advocates that it should be any different.

Unfortunately, or perhaps fortunately, so long as human beings rather than computers administer the processes of justice, mistakes and error will occur and injustices will be done. The courts of our land, including this Court with its highest and most final jurisdiction, are daily exposing and correcting these mistakes to the best of their ability. The question here before the Court is whether there was such a mistake or error in this case of a dimension to result in the denial of petitioner's right to counsel as set down in the Constitution of the United States, and as proclaimed by this Court in its decisions thereunder.

II

THERE ARE NO INHERENT DEFECTS EITHER IN THIS DEFENDANT, THE OPERATION OF LAW ENFORCEMENT AGENCIES, OR IN OUR SYSTEM OF CRIMINAL JUSTICE, WHICH REQUIRE A RULE OF THE CONSTITUTIONAL IMPACT AND PROPORTIONS HERE SOUGHT BY PETITIONER.

A. THE DEFENDANT.

The very description of the petitioner in his Question Presented[10] subtlely introduces a factual issue into

[10] **Id.** at 2.

this case which is of the gravest importance in resolving the ultimate legal question.

The words so carefully used were "poorly educated, mentally abnormal". No doubt other descriptive words and phrases could have been added—poor, motherless, unloved, downtrodden, culturally deprived, misguided, unguided, harassed, *ad infinitum.*

It is practically impossible to pick up a national magazine, professional journal, or listen to an address without some dramatice usage of these descriptive adjectives to characterize some greater or lesser portion of the American population.[11] And in the proper perspective, such attention, whether it be by this Court,[12] the Congress,[13] the executive,[14] or state and local governments,[15] is long overdue and, hopefully, will do something about the root-source of our most perplexing problems—not the least of which is the rising crime rate.[16]

However, to use these heart-rending descriptions in an attempt to justify or excuse the knowing and deliberate violation of our criminal statutes and the im-

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[11] E.g. **Nine "Unadoptable" Children Joined by Love,** Look Magazine, Oct. 19, 1965, at 54; **Winters, Counsel for the Indigent Accused in Wisconsin,** 49 Marq. L. J. 1 (1965); Inaugural Address of President John F. Kennedy, January 20, 1961, 107 Congressional Record, 1013.

[12] E.g. **Brown v. Board of Education,** 347 U.S. 483 (1954).

[13] E.g. Public Works and Economic Development Act of 1965, 42 U.S.C. §§3121-3226.

[14] E.g. State of the Union Address, President Lyndon B. Johnson, January 12, 1966, 112 Congressional Record 129.

[15] E.g. Operation LEAP (Leadership and Education for the Advancement of Phoenix), Ordinance No. S-3205, Dec. 15, 1964, City Council of Phoenix, Arizona, Implementing Resolution No. 11887, November 4, 1964.

[16] E.g. Hoover, **Annual Report of the Federal Bureau of Investigation, Fiscal Year 1965,** U.S. Department of Justice.

position of violence and suffering and depravation upon some individuals of our society by others, is misleading to say the least. Of this ilk, Miranda is a clear example.

Perhaps an eighth grade education, under a literal definition of the term and in the context of our affluent society, is a "poor education". Under no stretch of the imagination, however, can Miranda be deemed to be uneducated or illiterate. In addition to his formal schooling, petitioner had considerable and varied experiences which broadened his knowledge, particularly in the area which is of primary importance to us now.[17]

Counsel would have us believe that petitioner was incapable of producing the statement which was admitted against him (Appendix B. *infra*).[18] A simple reading and viewing of the statement refutes such a contention. The portion of the statement describing the actual events of the incident is in petitioner's hand and was written by him. Certainly the officers, if they were interested in putting words into Miranda's mouth, could have typed in these words also, in a favorable context, and simply obtained Miranda's signature to the whole. And although petitioner's grammar, sentence structure and punctuation leave much to be desired, the conclusion is inescapable that his knowledge and understanding of the difference between simple promiscuity and the crime of rape is more highly sophisticated than most of the Ph.Ds in our country.[19]

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[17] See n. 4, **supra.**

[18] Brief of Petitioner, n. 3.

[19] Note petitioner's careful use of the words "without force", "without force and with cooperation", "asked her to lay down, and she did". Appendix B, **infra.** See also petitioner's quoted sentence responses, statement of the case, **supra,** at 2.

Miranda is also labeled as "mentally abnormal". The basis for this is the psychiatric report (Appendix A, *infra*). While Miranda had an "emotional illness", it is questionable that this even made him "abnormal".[20] Clearly the diagnosis of the psychiatrist was to the effect that the illness was not disabling and that Miranda was able to understand the predicament he was in and knew the conduct society demanded of him at the time he chose to ignore those demands.[21]

B. THE POLICE

Admittedly there is no possible element of police brutality or coercion in this case, whether direct or subtle.[22] Yet petitioner, nevertheless, paints a picture of police disregard for rights guaranteed by our Constitution. The picture is inaccurate—but proving it so is almost a practical impossibility.

The articles, the studies, and the cases,[23] dealing, as they almost unanimously do, with the negative aspect of the problem, make it difficult to see the rule because of the emphasis on the exception. It is true that all

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[20] It has been estimated that at least 10% of our entire population have emotional illnesses of one type or another which should be treated professionally. Milt, **How to Deal With Mental Problems,** (National Asociation for Mental Health, Booklet, 1962).

[21] "It is my opinion that Mr. Mirande [sic] is aware of the charges that have been brought against him and is able to cooperate with his attorney in his own defense. Although Mr. Mirande [sic] has an emotional illness, I feel that at the time the acts were committed that he was aware of the nature and quality of the acts and that he was further aware that what he did was wrong." Appendix A, **infra.**

[22] Brief of Petitioner, at 10.

[23] E.g. LaFave, **Detention for Investigation by the Police: An Analysis of Current Practices,** 1962 Wash. U.L.Q. 331;

Smith, **Police Systems in the United States,** (2d rev.ed. 1960); **Ashcraft v. Tennessee,** 322 U.S. 143 (1944).

police officers are not interested in protecting the rights of the accused; it is true that there are convictions obtained by use of trumped-up evidence and wrongfully elicited incriminating statements and confessions; but these are the very few exceptions to the general rule. For every case of police insensitivity to individual rights, there are literally thousands of unreported incidents of the unstinting efforts of police and prosecutors which result in the extrication of an otherwise helpless and innocent victim, hopelessly intertwined in a web of circumstantial evidence of guilt.[24] The prime reason the vast majority of such instances go unreported and unstatisticized, is that the police and the prosecutor alike consider this just another important, but routine part of their work, which they do with the same dedication as they do the more spectacular phases.[25]

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[24] A person cannot talk to a police officer or prosecutor of many years tenure without hearing of numerous such incidents, many made possible by not only investigating extrinsic physical facts, but also by investigative questioning.

[25] The Law Enforcement Code of Ethics, as set forth in The Detroit Police Manual, and cited in Norris, **Constitutional Law Enforcement is effective Law Enforcement:** [Etc.], 43 U. Det. L. J. 203 (1965), n. 30, clearly reflects the importance of this particular responsibility, and represents the rule and not the exception:

"Law Enforcement Code of Ethics

As a Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice.

I will keep my private life unsullied as an example to all, maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officously or permit personal feelings, prejudices, animosities, or friendships to influence my decisions. With no com-

This Court, together with all the courts of our land, should and will continue to firmly and courageously deal with the exceptions to this rule. We must be careful, however, not to foreclose, limit or unduly hamper investigative techniques which, in their legitimate use, are not barred by any Constitutional mandate, solely because a few use the techniques to effect an unconstitutional result. The promulgation of such a rule of constitutional dimension in any given case would be as necessary as "Dr." Jerry Colona's recently suggested solution to Bob Hope's medical problem of a sore and infected big toe—to cut off Hope's head to relieve the execss weight on the toe.[26] While it goes without saying that the problem of the big toe would most certainly be forever solved, it is questionable whether the patient would be at all happy with the ancillary side effects of the treatment. As to whether a similarly undesirable side effect would be forthcoming from an unnecessarily broad constitutional rule in this case, we must look ahead.

C. THE NATURE OF THE CONTEST.

Petitioner, it seems, would have us interpret our adversary system of criminal justice as giving the ac-

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promise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to hold so long as I am true to the ethics of police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession—Law Enforcement."

[26] Bob Hope Christmas Special, N.B.C. Television Network, January 26, 1966, 8:30 P.M., M.S.T.

cused a right to "win" the contest.[27] While it may be inherent in the very nature of our system, with its vital and essential safeguards to individual freedom, that a person who actually commits a criminal act may have extra opportunities to escape punishment for his crime, it must be clear without comment or citation that the intent of the Constitutional safeguards were to insure, as much as humanly possible, that the innocent and unpopular would not be wrongfully harassed, intimidated or convicted—not that the guilty should have any special chances for acquittal or other favorable result.

If the prosecuting authorities have gained an overwhelming advantage over a particular defendant, assuming they have done so by proper methods, and not by violating any of his constitutional rights, this is to be highly commended, not condemned. It is a vital attribute of our society that the law enforcement machinery apprehend, convict and punish and/or rehabilitate those who would break the laws and endanger, if not destroy, our domestic tranquility. Law enforcement is not a game of chance, *Massiah v. United States,* 377 U.S. 201, 213 (1964) (Dissenting Opinion); *McGuire v. United States,* 273 U.S. 95 (1927). There is no "gamesmanship" or "sportsmanship" involved here, at least insofar as the criminal is concerned. He follows no code of conduct or canons of ethics. The death, suffering, and depravation caused by crime is as real to those who are touched by its sting as is that of any war ever fought. Certainly the criminal gives no quarter; and none should be given in return except as is required to insure the integrity and continuation of the system which we all cherish.

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[27] Brief of Petitioner, at 9.

Criminals, like the rest of us, are inherently unequal. Some are skilled, some not; some intelligent, some not; some trained, some not; some blabbermouths, some not; some strong, some not; some cruel, some not, etc. It certainly would not be urged that if a criminal is foolish enough to leave physical clues, the police should not be allowed to use them because X, who committed the same crime, was more careful. Or if Y was callous enough, or "intelligent" enough, to kill his rape victim to prevent identification, certainly Z, who also raped, should not be given the same opportunity to kill so as to have an equal chance at the trial to "win". So, too, are there differences between what happened to Ernesto A. Miranda as contrasted with what happened to Danny Escobedo[28] which militate in favor of a different resolution of their problem by this Court.

III

MIRANDA WAS NOT DENIED HIS RIGHT TO COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The decision in this case must rest upon the scope and effect to be attributed to this Court's decision concerning right to counsel at the interrogation stage, in *Escobedo v. Illinois,* 378 U.S. 478 (1964). While petitioner's historical analysis is to be highly commended for the care and effort which it reflects, his almost cursory treatment of *Escobedo,* coupled as it is with an

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[28] **Escobedo v. Illinois,** 378 U.S. 478 (1964).

inaccurate treatment of the Arizona Court's decision in the instant case, belies some doubt as to the absolute accuracy of the conclusion forecast as unassailable. Rather than obscuring the "simple lines of the situation",[29] the welter of the cases, the majority of which disagree with petitioner's conclusion,[30] coupled with the rather sharp divergence of opinion on this Court, not only in the recent decisions on this point, eg., *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois, supra,* but in the earlier decisions as well, e.g., *Crooker v. California,* 357 U.S. 433 (1958) and *Cicenia v. LaGay,* 357 U.S. 504 (1958), indicate the problem posed here to be anything but simple.

A. THE ARIZONA COURT'S DECISION.

Petitioner, at least twice,[31] states that the Arizona Supreme Court rested its opinion on petitioner's refusal to request counsel. A reading of the opinion clearly reveals that this was only one factor in many which resulted in a determination that Miranda was not denied his right to counsel (Statement of the Case, *supra,* at 4). The nature and length of the questioning, the warning advice given, and the background of the petitioner were equally important factors. Petitioner is correct in stating that the Arizona Court's decision did not in any way purport to rest on a waiver doctrine.[32] This is made amply clear in the Arizona

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[29] Brief of Petitioner, at 28.

[30] For an exhaustive citation of the cases construing **Escobedo,** both on a State and Federal level, see: Sokol, **Brief of Amicus Curiae in The Escobedo Cases,** (The Michie Company, 1966).

[31] Brief of Petitioner, at 6, 30.

[32] **Id.** nn. 7 and 15.

Supreme Court's decision in *State v. Goff,* .....Ariz. ....., 407 P. 2d 55 (1965), where the court referred to this aspect of its decision in *Miranda*:

> "We did not conclude from Escobedo that the Supreme Court of the United States held that arbitrarily and in every instance admissions made to police officers after an investigation has become accusatory are inadmissible in evidence unless a suspect has knowingly waived his right to counsel." *Id,* 407 P. 2d at 57.

The Supreme Court of California, in *People v. Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), and indeed the dissenting Justices of this Court in *Escobedo v. Illinois, supra,* 378 U.S. at 495, have forecast, as a minimum, a contrary conclusion. If this latter view is proved to be correct, that is the end of this case, and untold thousands like it throughout the length and breadth of this land. We choose, however, in turning our attention to *Escobedo,* to approach the import of that decision with the "hope" expressed by Justice Stewart in concluding his separate dissenting opinion in *Escobedo v. Illinois, Ibid.*

B. ESCOBEDO v. MIRANDA

Petitioner prefers to dwell on the implicit in *Escobedo.*[33] The explicit facts of the case are considered by respondent to be highly relevant and very crucial to the indicated result in Miranda.

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[33] **Id.** at 30—in fact, it would appear, on the following page of his brief, that he relies perhaps more upon the guiding light of the California Supreme Court than the pronouncements of this Court.

Danny Escobedo had retained counsel and repeatedly requested to consult with him. The requests were all denied. Escobedo was even told at one time that his lawyer didn't want to see him. On the contrary, Escobedo's lawyer was trying desperately to see his client, and was thwarted at every turn by the police, in spite of a specific Illinois statute requiring the police to admit the lawyer. *Escobedo v. Illinois, supra,* 378 U.S. at 480. Escobedo had no record of previous experience with the police. He was interrogated not only by police officers, but by a skilled and experienced lawyer. Escobedo was told that another suspect had pointed the finger at him as the guilty one. At no time was he ever advised of his constitutional rights by either the police or the prosecutor.

Ernesto A. Miranda was not represented by counsel at the time of the questioning here involved. He had not requested that counsel be provided, or that he be given an opportunity to consult with counsel prior to talking to the police. The officers did not deny him an opportunity to consult with counsel, nor did they in any way use chicanery in their questioning of Miranda. Petitioner had had considerable and varied experience with the police on previous occasions. Petitioner was advised of his constitutional rights, specifically including his right to remain silent, the fact that his statement had to be voluntary, and that anything he did say could be used against him.[34]

In setting forth the holding of the case, this Court very carefully enumerated the factors which resulted in the denial of counsel to *Escobedo*:

[34] It is not here disputed that petitioner was not specifically advised of his right to counsel.

> "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 counsel, 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. Wainright,* 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." *Escobedo v. Illinois, supra,* 378 U.S. at 490 and 491.

Of the five specific elements, which might be set forth as: (1) Accusatory Stage; (2) Police Custody; (3) Interrogation to elicit incriminating statements; (4) Request and Denial of an opportunity to consult counsel; and (5) Effective Warning of his absolute right to remain silent, petitioner contends that only (4) is absent here and that its absence is not crucial. Both premises are incorrect.

The Arizona Court clearly considered that Miranda had been warned of his absolute right to remain silent. The facts cited in that opinion, together with the Appendix to Petitioner's Brief, provided an ample basis for such a conclusion. And to discount item (4) concerning the request, is to completely ignore not only the plain wording of the opinion in *Escobedo*, but to completely disregard the factual and legal bases for the opinions cited in petitioner's historical analysis as

demanding the ultimate ruling sought herein. E.g., *Crooker v. California, supra,* (Douglas, J., dissenting):[35] *Spano v. New York*, 360 U.S. 315, 325 (1959), (Douglas, J., concurring).[36] The court lays a great stress on this factor, together with the failure of the police to warn the accused of his absolute right to remain silent. *Escobedo v. Illinois, supra,* 378 U.S. at 479, 480, 481, 482, 485, 486, 491, 492.

There are two other matters in the opinion itself which militate against petitioner's sought-for rule being all but announced. They are: (1) The treatment accorded the prior decisions of this Court in *Crooker v. California, supra,* 357 U.S. 433 and *Cicenia v. LaGay, supra* 357 U.S. 504, and (2) The Court's special and clear emphasis of the request for and denial of counsel in spite of its recent restatement that the right to counsel did not depend upon a formal request, *Carnley v. Cochran,* 369 U.S. 506 (1962).

Instead of completely overruling *Crooker* and *Cicenia,* the Court noted that the holding itself in *Crooker,* on the distinguishable facts in that case, which were set forth in some detail (*Escobedo v. Illinois, supra,* 378 U.S. at 491, 492), would possibly have been the same under the principles announced in *Escobedo.* In implicity accepting the result in *Crooker,* while discarding the language inconsistent with the principles

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[35] "This demand for an attorney was made over and again prior to the time a confession was extracted from the accused. Its denial was in my view a denial of that due process of law guaranteed the citizen by the Fourteenth Amendment." 357 U.S. at 442.

[36] "The question is whether after the indictment and before the trial the Government can interrogate the accused **in secret** when he asked for his lawyer and when his request was denied." 360 U.S. at 325. (Emphasis in original)

of *Escobedo,* the Court specifically approves the rejection of the absolute rule sought by *Crooker*:

> "That 'every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard to the circumstances of the case'.*" *Id,* at 491. (Emphasis in *Crooker*).

The continued rejection of the absolute rule sought by *Crooker,* implying as it does that in some cases a state could even deny a request without denying an accused his constitutional right to counsel, clearly rejects, *a fortiori,* the absolute rule sought by petitioner.

This result is also pointed to by the inclusion and emphasis of the request for counsel as a vital factor in *Escobedo* while not even including a reference to this Court's recent reemphasis of the unimportance of a request for counsel in the implementation of the absolute right to be provided counsel in *Carnley v. Cochran, supra,* 369 U.S. 506. The ommission of reference to *Carnley* must be considered to have been by design and not accident. Thus the scope of the rule, and the force of its emphasis, must be and is different.

The decision in *Escobedo* announces an exclusionary rule directed against the affirmative conduct of police and prosecutors calculated to deny to an accused his right to counsel. Any incriminating statements received thereafter, regardless of the fact that they are clearly the product of the free and uncoerced will of the accused, are inadmissible, *Escobedo v. Illinois, supra,* 378 U.S. at 491. The decision in *Massiah v. United States, supra,* 377 U. S. 201, although involving a fed-

eral prosecution, certainly reinforces this view of the *Escobedo* doctrine, particularly the last two paragraphs thereof.[37]

The rule announced is a parallel to that announced in *Mapp v. Ohio,* 367 U.S. 643 (1961), designed as a specific deterrent to police activity calculated to render meaningless the citizen's rights under the search and seizure provision of the Fourth Amendment to the Federal Constitution. It must also be applied with the same practical, non-technical, common sense approach as is the *Mapp* exclusionary rule. *United States v. Ventresca,* 380 U.S. 102 (1965).

A contrary application would result in attempting to make police officers part-time defense counsel and part-time magistrates, or deprive them completely of an investigative technique which, in its proper use and

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[37] "The Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S.S. Santa Maria, but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal charges against many defendants. Under these circumstances the Solicitor General concludes that the government agents were completely 'justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them.'

"We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against **him** at his trial." **Massiah v. United States,** 377 U.S. at pages 206 and 207. (Emphasis in original).

application, is as invaluable as any modern, scientific tool for the detection and prevention of crime.

The legal scholars and commentators have produced volumes of material on *Escobedo.*[38] It ranges the complete spectrum, from law professors and lawyers[39] to second and third year law students.[40] Both poles of the controversy are forcefully presented, including extensive citations to both primary and secondary authority, in the very recent publication of the University Press of Virginia: Kamisar, Inbau, and Arnold, *Criminal Justice in Our Time,* (Magna Carta Essays, Howard ed. 1965).

Ultimately, however, neither the overwhelming weight of the writings of the commentators, nor the weight of the decisions of the Judges and Justices of the other appellate tribunals of our land, whether state or federal, can dictate or necessarily foreshadow this Court's determination of the scope and effect of the principles announced in *Escobedo.*

If the rule sought by petitioner is forthcoming, we can only re-echo the ominous warnings and misgivings of the dissenters in *Massiah* and *Escobedo, supra.* Miranda and Escobedo are not equal and there is no Con-

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[38] For an exhaustive collection of citations see: Sokol, **Brief of Amicus Curiae in the Escobedo Cases, supra,** n. 29.

[39] E.g. Sutherland, **Crime and Confession,** 79 Harv. L. Rev. 21 (1965); Dowling, **Escobedo and Beyond,** 56 J. Crim. L., C.&P.S., 143 (1965); Herman, **The Supreme Court and Restrictions on Police Interrogation,** 25 Ohio St. L.J. 449 (1964).

[40] E.g. Comment, **Escobedo v. Illinois,** 25 Md. L. Rev. 165 (1965); Comment, **Right to Counsel During Police Interrogation, The Aftermath of Escobedo,** 53 Calif. L. Rev. 337 (1965); Note, **Escobedo in the courts, May Anything You Say Be Held Against You,** 19 Rutgers L. Rev. 111 (1964).

stitutional reason for this Court to equate them in the manner sought by petitioner, any more than there would be for this Court to balance their skill in committing and concealing their crime. No amount of scientific advancements in crime detection will produce evidence which a clever criminal has not been foolish enough to provide for discovery. If a criminal has been clever in the commission of his crime, but is foolish or careless in his handling of the police interrogation of him concerning that crime, the evidence obtained as a result of the only honest investigative avenue left open to the law enforcement agency, should not be suppressed unless that evidence is determined not to be the product of the free and uncoerced will of the accused, or if it is obtained after the police have undertaken a course of conduct calculated to deny the accused his right to counsel. Certainly nothing less will be tolerated, but the United States Constitution requires no more.

CONCLUSION

Quite appropriately, Justice Goldberg, who authored *Escobedo v. Illinois, supra,* provides the words most appropriate to conclude this brief. Speaking for the Court in *United States v. Ventresca, supra,* 380 U.S. 102, he said:

> "This court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant. [Presumably, for purposes of this case, confessions and admissions may be substituted for the final phrase concerning searches and seizures] [Citations omitted.] By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order. This court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires.
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> * * *
>
> *"It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community." Id,* at 111 and 112. (Emphasis added).

The officers in this case also acted within the constitutional standards, and it is equally vital that their actions be sustained.

The judgment and decision of the Arizona Supreme Court in this case below should be affirmed.

Respectfully submitted,

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GARY K. NELSON,
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of Counsel

February, 1966

APPENDIX A

JAMES M. KILGORE, JR., M.D.
Suite 209
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Phoenix 13, Arizona

PSYCHIATRY

May 28, 1963

Honorable Warren L. McCarthy
Judge of the Superior Court
Maricopa County
Court House
Phoenix, Arizona

MIRANDE, Ernest Arthur
Criminal Cause #41947, #41948

Ernest Arthur Mirande is a 23-year-old Mexican male who was examined by me in the County Jail on May 26, 1963.

Mr. Mirande is charged with the offense of robbery in relation to one Barbara Sue McDaniel on November 27, 1962. Mr. Mirande states that on that evening approximately 9:30 p.m. he saw a lady go to her car in the parking lot alone. He approached the car and got in the front seat. He stated at the time that he didn't know whether he would rob or rape the lady. She asked him if he didn't want to go to her apartment. Mr. Mirande stated that this frightened him in that she was so eager for sex and decided at that point to ask for money which she readily gave to him. He then said, "Don't worry. If I had wanted to rape you, I would have done it before."

The second offense for which Mr. Mirande is charged occurred on March 3, 1963, at which time he is supposed to have kidnapped and raped Patricia Ann Weir. Mr. Mirande stated that he knew Patricia Ann Weir, an 18-year-old single girl who worked in the theater. He had occasionally seen her there and on the evening of March 3 at approximately 11:00 p.m. he saw her walking toward the bus stop. He drove ahead of the bus and when she got off close to her home he was waiting for her. As she came close to the car he said to her, "You don't have to scream. I am not going to hurt you." He then told her to get into the car, which she did, and they drove out into the desert. He asked her to remove her clothing, which she did without resistance. He removed his clothes and performed the act of sexual intercourse. Miss Wir, according to the patient, did not resist, but during the process of sexual relations was tearful. Mr. Mirande was somewhat upset when he learned that the girl had not previously had sexual relations. He stated that if at any time the girl had refused or resisted, that he would not have proceeded. He then took her within a block or two of her house where he let her out. He asked if she would "tell on me." The girl did not respond. He stated "I didn't know how to ask her for forgiveness."

Mr. Mirande is age 23 and he has a common-law wife, age 30. They have been living together since August, 1961. His wife has two children by her first husband, a son, 11, and a daughter, 10. Mr. Mirande and his wife have a daughter, 9-½ months of age. He has worked as a truck driver and also as a worker in a warehouse. Mr. Mirande's father is age 55 and works as a painter in Mesa. He stated that he did not get

along with his father during his adolescent years and was frequently beaten up by his father when he got into trouble. Mr. Mirande's mother died in 1946 at the age of 34 when Mr. Mirande was six years of age. He was reared by his step-mother, age unknown. He stated with reference to her, "I never could get adjusted to her." Mr. Mirande completed half of the ninth grade at the age of 15. Mr. Mirande was first placed on probation at the age of 14 after having stolen a car. Three months later he was sent to Fort Grant for a period of six months. Shortly after returning he was sentenced for a year on an attempted rape and assault charge. According to Mr. Mirande's description of this incident, he was walking by a home in which he saw a lady lying in bed with no clothes on. He went up to the front door and it was open; he entered the home and crawled in bed with the woman. Her husband returned home shortly and the police were called. In 1957 at the age of 17 Mr. Mirande was picked up in Los Angeles for being a peeping tom and charged with lack of supervision and was placed on probation. He was also arrested twice in L.A. on suspicion of armed robbery. He was in the Army from April, 1958, to July, 1959. He was placed in the brig for being a peeping tom and given an undesirable discharge. In December, 1959, he was sentenced to the Federal Penitentiary for transporting a stolen automobile across state lines.

Mr. Mirande is a 23-year-old Mexican man who is alert and oriented as to time, place, and person. His general knowledge and information is estimated to be within normal limits as is his intelligence. He is emotionally bland, showing little if any effect. He is shy, somewhat withdrawn. He tends to be somewhat hypo-

active. The patient's responses to proverbs are autistic and somewhat bizarre; for example, to the proverb "a rolling stone gathers no moss", the patient interpreted this to mean "If you don't have sex with a woman, she can't get pregant." To the proverb "a stitch in time saves nine", Mr. Mirande's response is "If you try to shut something in, you keep it from going out." To the proverb "people in glass houses shouldn't throw stones", Mr. Mirande states "A person with one woman shouldn't go to another women." Mr. Mirande states that he is not particularly concerned about himself at this point or the trouble that he is in except in that it might interfere with his looking after his wife and child.

It is my diagnostic impression that Mr. Mirande has an emotional illness. I would classify him as a schizophrenic reaction, chronic, undifferentiated type.

It is my opinion that Mr. Mirande is aware of the charges that have been brought against him and is able to cooperate with his attorney in his own defense. Although Mr. Mirande has an emotional illness, I feel that at the time the acts were committed that he was aware of the nature and quality of the acts and that he was further aware that what he did was wrong.

/s/ James M. Kilgore, Jr.

JAMES M. KILGORE, JR., M.D.

JMK/db

APPENDIX B

STATE'S EXHIBIT 1

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

Form 2000-66-D
Rev. Nov. 59

Witness/Suspect
Statement

SUBJECT: Rape D.R. 63-08380

STATEMENT OF: Ernest Arthur Miranda

TAKEN BY: C. Cooley #413—W. Young #182

DATE: 3-13-63 Time: 1.30 P.M.

PLACE TAKEN: Interr Rm #2

I, Ernest A. Miranda, do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.

I, Ernest A. Miranda, am 23 years of age and have completed the 8th grade in school.

E.A.M. Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with

cooperation. Asked her to lay down and she did could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M.

I have read and understand the foregoing statement and hereby swear to its truthfulness.

/s/ Ernest A. Miranda

WITNESS /s/ Carroll Cooley

Wilfred M. Young #182