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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

PETITIONERS' REPLY BRIEF

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Argument

After the Brief for Petitioners in this case had been submitted to the printer, this Court announced its decision in *Tehan* v. *Shott,* —— U.S. ——, 15 L.ed.2d 453 (January 19, 1966). That decision, as well as some of the arguments contained in the Brief for Respondents, compel a short reply.

1. In light of this Court's decision in *Tehan* v. *Shott, supra,* it would be futile for Petitioners to persist in the argument that the decisions of this Court in *Malloy* v. *Hogan,* 378 U.S. 1 (1964) and *Griffin* v. *California,* 380

U.S. 609 (1965) (concluding that the Fifth and Fourteenth Amendments prohibit comment by the prosecutor on the failure of the accused to take the stand), are applicable to cases in which final judgment had been rendered prior to either of those decisions. Accordingly, Petitioners have abandoned that portion of the argument set forth in Point II of the Brief for Petitioners.

However, here the prosecutor's remarks went beyond the reasonable comment prohibited by *Griffin*. The comment of the prosecutor went beyond merely suggesting reasonable inferences to be drawn from the failure of defendants to take the stand or to present evidence. The prosecutor suggested to the jury untrue inferences to be drawn from that failure not justified by any facts in evidence. Thus, his comments [T.R. 255-256, 305], bolstered by the Court's charge on permissible inferences [T.R. 332], reinforces the argument set forth in Point V of the Brief for Petitioners, that the "totally inflammatory nature" of those remarks and summation deprived Petitioners of a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. As argued in the Brief for Petitioners, the comments made by the prosecutor and the trial court were demonstrably more prejudicial and inflammatory than the remarks involved in the *Tehan* case, since they not only related to a lack of defense, but they suggested that defendants were not even sorry about the crime. It is submitted that by the use of a trained and fertile imagination the prosecutor was able to suggest to the jury inferences not arising from any evidence but merely from failure of defendants to testify or present evidence—inferences which may be just as untrue as facts obtained by coerced confessions. These comments by the prosecutor considered in conjunction with

the misstatements and factual distortions contained in his summation, amounted to a violation of due process. See Brief for Petitioners, p. 41, and note 21.

Nothing said by this Court in *Tehan* v. *Shott, supra,* prevents a collateral attack on a conviction where the prosecutor uses inflammatory and intemperate language including wholly unsupported inferences in his summation. Use of such techniques may "infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *Shott, supra,* 15 L.ed.2d at 460. The basic principle underlying such an attack is identical with that allowing attack on a coerced confession: see *Jackson* v. *Denno,* 378 U.S. 368 (1964); without regard for the truth or falsity of the confession: *Rogers* v. *Richman,* 365 U.S. 534 (1961); and even though there is ample evidence aside from the confession to support the conviction. *Malinski* v. *N. Y.,* 324 U.S. 401 (1945); *Strahle* v. *Calif.,* 343 U.S. 181 (1952); *Payne* v. *Arkansas,* 356 U.S. 560 (1958).

2. Respondent expresses the fear that if accused persons are advised of their right to counsel, and if they obtain counsel, it would be the duty of counsel to protect their clients, guilty or innocent, which would in effect eliminate police interrogations. To state this argument is virtually to reduce it to a logical absurdity. The Respondent is in effect suggesting that the necessity of police interrogation outweighs rights granted by the Constitution and duties imposed on attorneys by their professional ethics. As noted by this Court in *Escobedo*:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the

> long run, be less reliable [fn. omitted] and more subject to abuse [fn. omitted] than a system which depends on extrinsic evidence independently secured through skillful investigation." 378 U.S. at 488-489, 12 L.ed.2d at 985.

In addition, this argument is factually unsound. The Brief as Amicus Curiae of the National District Attorneys Association offers statistics purporting to show that confessions are essential to effective police enforcement. The statistics offered, however, do not prove the point. They simply show that in the vast majority of cases tried, confessions are used. The statistics are not geared in terms of arrest; thus they do not show the numbers of cases which do not reach prosecution because confessions are not obtained. They do not disclose the techniques used to obtain the confessions, nor whether the convictions obtained thereby are ultimately reversed because of those techniques.

Nor do they demonstrate that a proper warning as to the constitutional rights of the accused will in any way limit the number of confessions obtained. In fact, although sufficient empirical data is not yet available, figures collected by the Philadelphia Police Department and the District Attorney's Office (compiled, in fact, under the direction of the same Assistant District Attorney who provided the data for Pennsylvania contained in the *National District Attorneys Association's Brief,* p. 38a) shows that the *Escobedo* decision did not reduce the effectiveness of police interrogations.

"Rule That Suspects Must be Warned of Right to Lawyer Fails to Reduce Confessions.

by Paul F. Levy
of the Bulletin Staff

Warning suspects of their right to legal counsel before questioning them has not sharply reduced the effectiveness of police in obtaining confessions and incriminating statements.

In fact, figures collected by the police department and district attorney's office indicated that even after such warnings, the majority of suspects are still talking themselves into jail.

The figures, while only for a two-weeks period, appear to refute the statements of law and officials that recent federal court decisions requiring such warnings would 'wreak catastrophic havoc' on police.

Involves 208 Cases.

Collected by the police during the weeks of Oct. 17 and Oct. 24 the figures indicated that even after police warned suspects of their right to a lawyer, two-thirds refused the aid and confessed on their own.

The figures were collected in 208 cases, ranging from car theft to homicide, in which a suspect was questioned by police.

In only one category, robberies, did the majority of suspects refuse to talk without a lawyer after being warned that they had such a right.

Assistant District Attorney Richard A. Sprague, who is analyzing the figures after they are collected by Chief Inspector Harry G. Fox, head of the detective divison, said a 'longer period of time (than two weeks)

will be needed before we can see the full effect of such warnings.'

'But so far it isn't as great a percentage (of suspects refusing to talk) as we originally believed,' he added.

According to the first dire prediction by law enforcement officials, almost every criminal would have refused to talk and walked out free.

The prosecutors associations made the claim in a petition asking the U. S. Circuit Court of Appeals for the Third Circuit, which laid down the requirement that suspects be warned of their right to counsel, to reverse itself. The court refused.

The police figures, which tend to refute this claim, ironically were collected in preparation for inclusion in a brief to be filed with the U. S. Supreme Court if the case reaches that level.

Of the 208 suspects questioned by police during the two-week period, the figures show 136 still gave police a confession after being warned not only of their right to counsel, but of their right to remain silent even without counsel present.

Of the 12 homicide suspects questioned during the two weeks, only three refused to talk. The nine gave complete confessions to police.

Of the 15 rape suspects, three refused to talk and 12 confessed.

Of the 27 car theft suspects, three refused to talk and 24 confessed.

Of the 57 theft suspects, 20 refused to talk and 37 confessed.

Of the 48 burglary suspects, 21 refused to talk and 27 confessed.

The only category where a majority of the suspects refused to talk was in robberies, where 19 of the 25

about to be questioned refused to talk to police until they conferred with a lawyer.

After conferring, Sprague pointed out, none of the 19 talked further to police.

A preliminary analysis of the figures, Sprague said, 'tends to support the theory that where the warning hurts law enforcement is with the professional criminal—the burglar or robber—who is more likely to understand the implication of such a warning.' "

The Philadelphia Evening Bulletin, Wednesday, Nov. 17, 1965, p. 35.

3. Respondent argues that *Escobedo* should not be applied "retroactively" since it represents a new constitutional principle, and that these convictions were not based on a "probable or even a possible false confession" (Brief for Respondents pp. 19-20). This argument is based on a misreading of *Escobedo* and a false factual premise.

As already noted in our principal brief, *Escobedo* did not announce radical new constitutional doctrine. It merely refined and extended the definition of the "stage when legal aid and advice are surely needed". *Escobedo* v. *Illinois,* 278 U.S. 478, 488, 12 L.ed.2d 977, 984 (1964), citing *Massiah* v. *United States,* 377 U.S. at 204, 12 L.ed.2d at 249 (1964).

The incorrect factual premise on which this argument rests is that the confessions were true. In the first post-trial motion it was argued that these confessions were untrue in admitting homicide during the course of a robbery. It was argued that those portions were "fed" to Petitioners who were mentally and psychologically unequipped to evaluate and reject them. In their psychological and mental conditions, and with their limited education and weak psy-

chological backgrounds, Petitioners could easily accept the police suggestion that a robbery was involved, since admitting to a robbery would have seemed so minor a matter compared to admitting to a homicide. They could not have known the legal significance of the felony-murder doctrine. This emphasizes the necessity for legal advice at that stage of the interrogation.

The later futile attempts of trial counsel to gain sympathy and leniency for their clients by arguing to the jury that their clients "cooperated" and "told the truth" in their statements cannot be considered as admissions that the statements were true and freely given—but merely demonstrated their desperation when faced with such damaging confessions. The fact that at the time the confessions were transcribed petitioners were told—in fact, almost threatened—that the statements must be truthful and given of their own free will, but without any warning as to their right to remain silent or consult counsel, did nothing to assure truthful, voluntary statements. The admissions concerning robbery had already been obtained orally after many hours of persistent questioning, psychological and even physical pressures, as well as "feeding" of those admissions. The recording of the statements was a mere formality; and the stock (albeit incomplete) recitation of "constitutional rights" merely gave the appearance of legality to a *fait accompli.*

4. In attempting to justify the refusal of the trial court to grant a severance and separate trials or to strike out objectionable and hearsay references, the Respondent says only that this is a matter for the discretion of the trial court, and that separate trials would have been expensive.

This argument assumes that the only remedy would have been separate trials. It overlooks the other remedy suggested—the remedy of deleting cross-incriminating references from the confessions. See *People* v. *Aranda,* —— Cal.2d ——, 34 U.S.L. Week 2261 (Nov. 12, 1964); *State* v. *Young,* 215 A.2d 352 (N.J. Sup. Ct. Dec. 20, 1965). Furthermore, the economy and expedition achievable by a single trial are not goals to be sought at the cost of constitutional rights of defendants to have a trial free from the prejudicial effect of hearsay incriminating statements of co-defendants. See *People* v. *Krugman,* 252 N.Y.S.2d 846 (Sup. Ct. N.Y. Crim. Term, Kings Cty., Part 1, 1964).

Conclusion

For all of the reasons set out above, as well as those contained in the Brief for Petitioners, it is respectfully submitted that the judgment of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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