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The Right To Counsel During Police Interrogation - Escobedo v. Illinois, 25 Md. L. Rev. 165 (1965)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol25/iss2/5
On January 20, 1960, Danny Escobedo, a twenty-two year old of Mexican extraction with no record of previous experience with police, was arrested without a warrant and was interrogated for the fatal shooting of his brother-in-law. He made no statement to the police and was released late that afternoon pursuant to a state court writ of habeas corpus obtained by a lawyer who had been retained by Escobedo. Ten days later, having been implicated in the shooting by co-defendant, Di Gerlando, he was arrested along with his sister. Shortly after he reached police headquarters his lawyer arrived and asked to see him. The police would not allow the attorney to consult with Escobedo since they had not completed the interrogation. Throughout the three hour interrogation, Escobedo repeatedly asked to see his lawyer and was given no opportunity to do so. However, he did, through an open door, catch a glimpse of his lawyer who reportedly motioned to him to keep silent. During the interrogation, Escobedo was never advised of his right to remain silent, and he was supposedly promised in Spanish that he and his sister could go home and that he would not be prosecuted if he confessed. Finally, after confrontation with Di Gerlando, he admitted that he had some knowledge of the crime. After questioning by a state's attorney whose primary function was to "take statements," Escobedo further implicated himself in the murder plot. The trial court received the confession over the objection of Escobedo's counsel, and defendant was convicted of murder. On appeal, the Illinois Supreme Court reversed the conviction on the ground that the statement, induced by a promise of immunity from the prosecution, was inadmissible. On rehearing, the court reaffirmed the conviction, finding that Escobedo was intelligent and fully aware of his rights, having been advised of them by his attorney, and concluded that the presence of counsel during interrogation would unduly hamper police activities and preclude effective police interrogation.

The Supreme Court, Justice Goldberg writing the majority opinion, reversed and held that:

"[W]here, as here, [1] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, [2] the suspect has been taken into police custody, [3] the police carry out a process of interrogations that
lends itself to eliciting incriminating statements, [4] the suspect has requested and been denied an opportunity to consult with his lawyer, [5] 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 . . . , and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 8

The Court reasoned that under these five circumstances the adversary system begins to operate 9 and that the "fact that many confessions are obtained during this period [of interrogation] points up its critical nature as 'a stage when legal aid and advice' are surely needed." 10 At this critical stage the accused must be permitted to consult with his lawyer, for "the right to counsel 11 would indeed be hollow if it began at a period when few confessions were obtained." 12

In its effort to set up procedural safeguards for the criminal defendant, the Supreme Court has previously held that the accused is entitled to be represented by counsel in federal and state criminal prosecutions 13 and that counsel must be appointed if the accused is indigent. 14 The Court has provided for additional safeguards which require that counsel must be appointed at a time, far enough in advance of trial, which would enable him to prepare an adequate defense; 15 at a time when the stage of the proceedings has become critical; when the results of the proceedings could affect the whole trial and the accused is in danger of irretrievably losing his rights. 16 Under Escobedo, once the interrogation focuses upon the accused and it is for the purpose of eliciting incriminating statements, the accused is in danger of irretrievably losing his rights.

8. 378 U.S. at 490-91. 9. Id. at 492. 10. Id. at 488.
11. "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The guarantees of the sixth amendment were made applicable to the states through the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963). The right to counsel is also guaranteed by the constitutions of most of the states. Fellman, The Right to Counsel Under State Law, 1955 Wis. L. Rev. 281.
12. 378 U.S. at 488.
16. Hamilton v. Alabama, 368 U.S. 52 (1961). The court held that arraignment under Alabama law is a critical stage in a criminal proceeding and therefore available defenses may be irretrievably lost, if not then and there asserted. See also White v. Maryland, 373 U.S. 59, 60 (1963). Without the advice of counsel, defendant made a plea of guilty when arraigned at a preliminary hearing. This plea, subsequently withdrawn, was introduced in evidence at the trial. The Court held that, even though under Maryland law defenses not raised at this time may be raised later, it was a critical stage and the presence of counsel was necessary so that defendant might have known of all his defenses and have pleaded intelligently. See also DeF Toro v. Poppersack, 332 F.2d 341 (4th Cir. 1964), cert. denied, 379 U.S. 909 (1964). In this case, the court held that since, in Maryland, a preliminary hearing is not, in and of itself, a critical stage, defendant's plea of not guilty, entered without representation of counsel, was not prejudicial to the ensuing trial.
The problem of protecting the defendant's constitutional rights during interrogation has been a difficult one since little is known about what goes on during this often secret period.\(^\text{17}\) When the accused does complain, his story is usually overwhelmed by the testimony of the interrogators who deny the abuse.\(^\text{18}\) In its attempt to regulate the activities of the police during interrogation, the Court has held confessions to be involuntary and coerced and in violation of due process where the accused was physically beaten and burned;\(^\text{19}\) where he was interrogated for long periods of time without rest or natural comforts;\(^\text{20}\) or where psychological pressure was used to induce him to confess.\(^\text{21}\) The mischief and abuse of the third degree should be sharply reduced now that an accused who has requested counsel no longer can be denied counsel at this most critical period.\(^\text{22}\)

The decision in *Escobedo* was based upon the recognition that many confessions are obtained by interrogating the accused during the period between arrest and indictment\(^\text{23}\) and that this period often becomes the critical stage\(^\text{24}\) of the proceedings. Therefore the Court extended the right to counsel to this point. The presence of counsel during interrogation serves as a buffer between the well-supported professional prosecuting machinery of the government, both state and federal, and the defendant.\(^\text{25}\) That the defendant will be fully informed of his rights is assured by counsel's presence. The Court stated that "[N]o 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", nor should it fear a defendant being made aware of his rights by counsel.\(^\text{26}\)


\(^{20}\) Ashcraft v. Tennessee, 322 U.S. 143 (1944). Defendant had been held incommunicado for 36 hours, during which time without sleep or rest, he had been interrogated by relays of officers.

\(^{21}\) Spano v. New York, 360 U.S. 315 (1959). After consultation with his attorney, defendant, who was accused of murder, turned himself in to the police. He was interrogated but refused to answer questions. His request to contact his attorney was denied. To induce him to confess, the police called in a fledgling police officer, who was also a close friend of the defendant, to play on defendant's sympathy. He told defendant that he would lose his job if defendant did not confess.

\(^{22}\) See note 10 supra and accompanying text. See also Crooker v. California, 357 U.S. 433, 444 (1958) (Douglas, J., dissenting). "The mischief and abuse of the third degree will continue as long as an accused can be denied the right to counsel at this the most critical period of his ordeal."

\(^{23}\) 378 U.S. at 488. See *An Historical Argument For the Right to Counsel During Police Interrogation*, 73 Yale L.J. 1000, 1048-51 (1964). In a case just prior to *Escobedo*, the Court held that after indictment an accused cannot be questioned without the presence of his counsel. Massiah v. United States, 377 U.S. 201 (1964). See also *The Coming of Massiah: A Demand for Absolute Right to Counsel*, 52 Geo. L.J. 825 (1964).


\(^{26}\) Id. at 490.
The logical conclusion of this rationale would be that a criminal defendant has an absolute right to counsel during police interrogation, and therefore, any admissions made to the police without the presence of counsel should be excluded. However, the majority of the Escobedo Court would not go that far. First, it distinguished but refused to overrule Crooker v. California and Cicenia v. Lagay. In determining whether or not due process had been violated by the states' denial of the request for counsel, the Court in the two cases applied the totality of events test, that is, in light of the sum total of all the circumstances which led to the confession, was the state's denial of the request for counsel so prejudicial that it infected the fundamental fairness of the trial. The Court held that Crooker's and Cicenia's confessions were voluntary and therefore admissible. Second, the


28. In Escobedo, Justice White, joined by Justices Clark and Stewart, dissented. (Justice Harlan dissented in a separate opinion on the ground that Cicenia v. Lagay, 357 U.S. 504 (1958), was controlling.) Justice White said that "it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel... or has asked to consult with counsel in the course of interrogation." Justice White found that the Court in holding "once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel" -- has created an impenetrable barrier to any interrogation. He concluded that the Court, in moving in the direction of barring from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not, would put "us one step 'ahead' of the English judges who have had the good sense to leave the matter a discretionary one with the trial court." 378 U.S. at 495.

29. The Court said, "In any event to the extent that Cicenia or Crooker may be inconsistent with the principles announced today, they are not to be regarded as controlling." 378 U.S. at 492.

30. 357 U.S. 433 (1958). In this case, defendant was a 31-year old college graduate who had attended the first year of law school and had studied criminal law. During the interrogation he asked to call a specific lawyer. He claimed his confession was coerced on the basis of the denial of his request for counsel and contended that every state denial of his request for counsel was an infringement of his constitutional rights regardless of the circumstances of the case. The Court, by Justice Clark, held that the coercion factor was negated by defendant's age, intelligence and education and that defendant showed full awareness and was advised of his right to be silent. As for defendant's other contention, Justice Clark felt that if it were sustained it would have a devastating effect on enforcement of criminal law. Justice Douglas, joined by the Chief Justice and Justices Black and Brennan, dissented vigorously.

31. 357 U.S. 504 (1958). The facts of this case are strikingly similar to those in Escobedo. Defendant, on the advice of his attorney, went with his father and brother to the police station and turned himself in. In the early afternoon, his attorney came to the station and asked to see the defendant. He was refused. During this time, the defendant was being interrogated and was asking to see his lawyer. He was not allowed to see his lawyer until after he had confessed. The Court held the confession to be admissible since there was an absence of showing of prejudice to the defendant by the denial of counsel. In relying on Crooker, the Court said that it had "sought to achieve a proper accommodation by considering a defendant's lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness." 357 U.S. at 509. Again Justice Douglas, joined by Chief Justice Warren and Justice Black, dissented. Brennan took no part in the decision.

32. The test of voluntariness has been criticized as being unsuited to the adequate protection of the right to counsel, since it fails to provide equal knowledge of and ability to exercise the right. The Coming of Massiah: A Demand For Absolute Right to Counsel, supra note 23, at 830.

33. The sum total of events did not approach the prejudicial stage nor did they show defendants to have been "taken advantage of" by the state's denial of requests for counsel. Crooker v. California, 357 U.S. 433, 440 (1958); Cicenia v. Lagay, 357 U.S. 504, 508 (1958).
Escobedo Court apparently limited the decision to the five factors of the case. Although it does not make the right to counsel absolute, at least the decision in Escobedo implies that the accused, if he has requested counsel, must be given the right to consult with counsel and effectively advised of his right to remain silent once the investigative process begins to focus upon him — generally, at the time of arrest.

AFTER ESCOBEDO

The Escobedo decision, limited to the five circumstances, has posed three basic questions: (1) When does an interrogation become accusatory and focused upon the defendant? (2) Must the state affirmatively advise the accused of his right to remain silent? (3) Must the accused be advised of his right to counsel or must he specifically request the assistance of counsel?

The courts have met the problem posed by the first question by carefully scrutinizing the facts of each case to see whether the defendant's voluntary admission was made before he was suspected of having committed the crime which the police were currently investigating or whether the interrogation of the suspect about the crime was for the purpose of eliciting incriminating statements. In People v. McElroy, a New York case, defendant walked into the police station and voluntarily confessed. During interrogation defendant made no request for counsel, and after interrogation, a written statement was given. The court held that a substantial portion of defendant's confession was given before the crime had been established as far as the police were concerned. In People v. Agar, the same court held that the mere arrest by a police officer of a suspect is not the commencement of a

34. Justice Goldberg said, "We only hold that when the process shifts from investigatory to accusatory -- when its focus is on the accused and its purpose is to elicit a confession -- our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." 378 U.S. at 492. (Emphasis added.)

35. Justice White, in his dissent, said, "[T]he opinion purports to be limited to the facts of this case. . . ." 378 U.S. at 495. If this were true, other facts which might limit the decision are: (1) Defendant had previously obtained counsel who was trying to get in touch with him. See also People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628 (1963), cited with approval, 378 U.S. at 486. For a discussion of the New York case, see 52 Geo. L.J. 629 (1964). (2) Escobedo had had no previous police experience. See also Powell v. Alabama, 287 U.S. 45 (1932). (3) A policeman had reportedly promised to release him if he would co-operate. See also Malloy v. Hogan, 378 U.S. 1, 7 (1964). (4) He was denied access to his lawyer and was held incommunicado from others. See also Haynes v. Washington, 373 U.S. 503 (1963).

36. One week before Escobedo was decided, the Supreme Court in Malloy v. Hogan, 378 U.S. 1 (1964), held the fifth amendment, which guarantees the right of a person to remain silent unless he chooses to speak "in the unfettered exercise of his own will, and to suffer no penalty," was applicable to the states.

37. 378 U.S. at 490.

38. Where the cases were final before Escobedo, Escobedo was held not to be retroactive in People v. Hovnanian, 22 App. Div. 2d 686, 253 N.Y.S.2d 241 (1964) and In re Lopez, 42 Cal. 2d 398 P.2d 380 (1965). Escobedo was held to be retroactive in Fugate v. Ellenson, 237 F. Supp. 44 (D. Neb. 1964).

39. Note 8 supra and accompanying text.

40. 43 Misc. 2d 924, 252 N.Y.S.2d 597 (Albany County Ct. 1964).

41. 44 Misc. 2d 396, 253 N.Y.S.2d 761 (Queen's County Sup. Ct. 1964). See also People v. Livingston, 22 App. Div. 2d 650, 253 N.Y.S.2d 1 (1964). Defendant's confession was held admissible since the interrogation ceased when he requested counsel.
judicial proceeding and does not preclude admissions taken in absence of counsel. In a Virginia case, a seventeen year old accused of rape was being interviewed as to whether or not he should be tried as a juvenile or an adult when he made the admission of having intercourse with the victim. The court held the statements were admissible since the interrogation was not for the purpose of eliciting incriminating statements. In *State v. McLeod* defendant confessed while riding with police who were looking for the hold-up gun. The court held that since the statement was made while defendant was voluntarily aiding police it was admissible. Threshold statements were also held admissible where the statements were made in the field when defendants were caught after a manhunt and while they were on route to the police station. The court found that at the time the statements were made the police purpose was apprehension. Also the defendants, who were mature and experienced in police matters, were warned by the police to remain silent, and they made no request for counsel. The decisions by these courts raise the question of whether or not an accused’s confession of a crime unrelated to the crime about which the police were interrogating him would be a “threshold statement” and therefore admissible. A few courts have held that such statements would be admissible.

The question of whether or not *Escobedo* can be read as requiring the state to affirmatively warn the defendant of his right to remain silent has produced conflicting answers. In an Oregon case defendant was not informed, prior to making a confession, that he was entitled to remain silent prior to investigation. The accused did not request the assistance of counsel; therefore, one of the critical facts present in the *Escobedo* case was absent. However, the court refused to rule on whether such a request was necessary before an accused could successfully contend he was deprived of his right to counsel. The court did rule that the *Escobedo* decision requires that an accused be effectively advised of his constitutional right to remain silent and that if this is not affirmatively shown by the state, a confes-

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42. Wansley v. Commonwealth, 205 Va. 412, 137 S.E.2d 865 (1964). But see People v. Anderson, 40 Cal. 257, 394 P.2d 945 (1964). Here, before and during interrogation defendant at all times admitted he must have committed the crime but maintained he could not remember the details. The court held that, although the questioning by the police may have only concerned defendant’s reasons for having committed the crime, the interrogation was investigatory and accusatory.

43. 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964).

44. *Escobedo* was also distinguished on the basis that defendant made no request for counsel. State v. McLeod, 1 Ohio St. 2d 60, 203 N.E.2d 349, 351 (1964).


47. State v. Neely, 79 Ore. 257, 395 P.2d 557 (1964). For other cases broadly interpreting *Escobedo*, see Greenwill v. United States, 336 F.2d 962 (D.C. Cir. 1964). After arrest, FBI agents, having warned defendant of his right to silence and counsel, questioned him in a parked car. The court held that this was a secret interrogation and confession was inadmissible; see also State v. Dulour, R.I. 206 A.2d 82 (1965).

48. A Florida court, in Murphy v. State, 166 So. 2d 759 (Fla. Dist. Ct. App. 1964), reversed a conviction where the court failed to advise accused of his constitutional rights to counsel. Basing its decision on Carney v. Cochran, 369 U.S. 506 (1962), and not mentioning *Escobedo*, the Court held that “the failure of appellant to request counsel does not constitute a waiver of the right.” 166 So. 2d at 760.
sion obtained without such a warning is inadmissible. In *People v. Hartgraves*, the Supreme Court of Illinois read *Escobedo* as holding that "the refusal of a request to consult with counsel, coupled with a failure to advise accused of his right to remain silent, amounted to a denial of the 'assistance of Counsel'." In *Hartgraves* the court found that the defendant had not requested counsel, and therefore, it held that, under all of the circumstances, the failure to advise the accused did not compel a rejection of the confession.

Whether the accused must specifically request counsel is a question which has also been treated by the courts in divergent ways. In *Dorado v. California*, the California Supreme Court, interpreting *Escobedo* broadly, overturned a conviction because the interrogating officer had not advised the accused of his right to remain silent and of his right to counsel and held that a request is not a prerequisite to the right of counsel during interrogation. In this case, the defendant, an inmate of San Quentin prison, was accused of killing another prisoner. He was taken to the warden's office and interrogated without having been informed of his rights to counsel or to remain silent. The California Supreme Court held that once the investigation focused on the defendant, any incriminating statements given by the defendant during interrogation to the investigating officers became inadmissible, in the absence of counsel, by the failure of the officers to advise defendant of his right to an attorney and his right to remain silent. In this case, defendant failed to request counsel, however the court held, in light of *Escobedo*:

"We find no strength in an artificial requirement that a defendant must specifically request counsel; the test must be a substantive one: whether or not the point of necessary protection for guidance of counsel has been reached.

"The defendant who does not realize his rights under the law and who therefore does not request counsel is the very defendant who most needs counsel. . . .

". . . The requirement for the utterance of special words of request would compel an unreliable and discriminatory formalism."  

In *People v. Agar*, the New York Supreme Court interpreted *Escobedo* as being limited to its particular facts and held that a confession is inadmissible if police have failed to warn defendant of his right to remain silent and have denied his requests for counsel. The court also held that the police need not warn defendant of his right to

50. 31 Ill. 2d 375, 202 N.E.2d 33 (1964); see also People v. Agar, 44 Misc. 2d 396, 253 N.Y.S.2d 761 (Queens County Sup. Ct. 1964).
51. 202 N.E.2d at 35.
53. 394 P.2d at 956–58.
54. 44 Misc. 2d 396, 253 N.Y.S.2d 761 (Queens County Sup. Ct. 1964). Defendant challenged the admission of his confession on the grounds that the police had not advised him of his right to counsel.
counsel. 55 However, the court added that if the police deny the request of the lawyer of the accused to see his client, even if the accused had not asked to confer with his lawyer, 56 a confession is inadmissible. It will be recalled that in Escobedo the accused's lawyer had requested permission to see him; however, Justice Goldberg did not include this factor among the five circumstances which would make a confession inadmissible. Thus Agar, though purporting to limit Escobedo, 57 has, in one respect, extended it.

The Maryland cases typify the holdings of the majority of the courts 58 which have distinguished the cases before them from Escobedo on the fact that Escobedo made a request to see his counsel, whereas the defendants before them had made no such request. Two days after Escobedo was handed down, the Maryland Court of Appeals, 59 in Sturgis v. Maryland, 60 using the "sum of the circumstances" 61 test, refused to overturn a murder conviction. In this case defendant, who denied knowledge of the crime when arrested, confessed after four

55. 253 N.Y.S.2d at 764.
56. The court said that Escobedo, "limited to its particular facts, and without reference to the other language in the opinion, . . . does no more than agree with People v. Donovan, [13 N.Y.2d 148, 193 N.E.2d 628 (1963)]." In Donovan, the same court, in a pre-Escobedo decision, held that a confession taken from the defendant, after his attorney had requested and been denied access to him, could not be used against him.
57. The New York court in exasperation said, "It is the language in Escobedo (pp. 485, 490-91, 492, 84 S.Ct. pp. 1762, 1764-66 [sic], however, which gives rise to varying interpretations of what the court holds the law to be on the subject matter of confessions," 253 N.Y.S.2d at 762.
59. The present Supreme Court's rulings on the rights of the criminally accused have been severely criticized in Maryland. See H. V. Eney, President of the Maryland State Bar Association, Changing Concepts of Criminal Justice, The Daily Record, Vol. 153, No. 9, pp. 2-3 (July 11, 1964). "[T]he principle of stare decisis crumbled to dust from the blasts of the Warren majority on the Supreme Court." See also W. J. O'Donnell, Report of State's Attorney's Office of Baltimore City, Jan. Term 1963 to Jan. Term 1964. "[T]he Supreme Court, in the overly liberal viewpoint of five of its members has tended to over-emphasize the individual constitutional rights of a defendant in a criminal case and seem to overlook the collective constitutional rights of society to be protected against crime and from criminals thereby creating an imbalance in favor of defendants against law enforcement." Page 5.
60. 235 Md. 343, 201 A.2d 681 (1964).
61. For Maryland cases applying the test "sum of the circumstances" to determine voluntariness, see 24 Md. L. Rev. 217 (1964). For a discussion of right to counsel in Maryland before Escobedo, see Turnbull, supra note 14, at 848-51.
days in jail without a hearing or counsel. He signed a self-incriminating statement which contained a clause stating that he had been advised of his constitutional right to remain silent. The court distinguished this case from Escobedo since defendant did not state that he ever requested to see an attorney or that his request was denied. In a later case, Green v. Maryland, the court distinguished Escobedo on the basis of these facts: Green had not previously retained counsel; he had never requested counsel; he had enjoyed several encounters with law officers and courts; he did not contend that there were any promises of release if he confessed; and he was advised of his right to remain silent. In Mefford v. Maryland, the court concluded that the holding in Escobedo was limited to the facts and circumstances before the Supreme Court and held that a specific request for counsel must be made by defendant and denied. Mefford and Blackburn were jointly indicted for robbery and first degree murder committed during robbery. Each was convicted in a separate trial. On appeal, both contended that their confessions were involuntary and, in addition, Blackburn contended that his confession was inadmissible since his request for counsel was denied. The court examined the events (four days in jail) that led up to Mefford's confession and found that he had given it voluntarily. Blackburn was arrested at home at three a.m. on April twenty-third. He was taken to the police station dressed only in a T-shirt and pants, and after an hour of interrogation was put in a cell which he said was cold. He testified that he was not given anything to eat, but the police said he was. Blackburn's testimony that he asked that he be charged so he could get a lawyer was denied by police. The court refused to hold the confessions involuntary and cited Escobedo as limited to its facts and not contrary to Crooker or Cicenia. The court, in distinguishing Escobedo, said that Mefford never asked or hinted to the state police that he wanted counsel and that Blackburn did not request the assistance of counsel in connection with the questioning by the police, but only asked them to charge him so he could then be provided with a lawyer.

However, the Fourth Circuit Court of Appeals, in Miller v. Warden, Md. Pen., decided after Sturgis, Green and Mefford & Blackburn, rejected the position of the Maryland court that a specific request for counsel be made. In this case, the defendant was convicted by the Criminal Court of Baltimore of robbery with a dangerous weapon. On arrest, Miller, who was inebriated, was taken to the police station, booked and interrogated for a half hour. Miller claimed that before and during interrogation he had requested permission to call members of his family and an attorney whom he had previously employed to represent him in a civil case. The police denied that such requests were made. At a subsequent period of interrogation, during

63. To compare the facts in Escobedo, see note 36 supra.
64. 235 Md. 497, 201 A.2d 824 (1964), cert. denied, ... U.S. ... (1965).
65. 235 Md. at 516-17, 201 A.2d at 833-34.
66. Blackburn made the same request when first arrested by the Baltimore County Police. 235 Md. at 509.
67. 338 F.2d 201 (4th Cir. 1964).
which police again denied his requests for permission to make a telephone call, Miller confessed. On appeal, he challenged the admission of the confession. The Maryland Court of Appeals\textsuperscript{68} held that even if Miller had sought and been denied counsel, that circumstance alone, without showing that the confession was not his free and voluntary act, would not make his confession inadmissible. Miller then petitioned the Federal District Court for a writ of habeas corpus in which he contended that he was denied due process because the police refused his requests for permission to use the telephone. The District Court,\textsuperscript{69} in a pre-\textit{Escobedo} decision, found that, although the accused had asked to use the telephone, he had made no quest for permission to call his lawyer. The District Court held that it was not unreasonable, in view of defendant's inebriation, for the police to postpone his right to use the telephone until the interrogation could be completed. The Circuit Court overruled this decision and held that if the other circumstances in the \textit{Escobedo} decision are met and "if the intent [to request counsel] exists and he [the accused] is denied an opportunity to contact the outside world, it is enough to bring this case within the holding in \textit{Escobedo} . . . .\textsuperscript{70} However, the court in arriving at this conclusion did "not think it necessary . . . to rely upon that decision to the full extent of its holding according to the dissenting opinion of Mr. Justice White, who read the decision to hold that it was not necessary that the accused should have retained counsel or should have asked to consult with counsel in the course of the interrogation.\textsuperscript{71}

CONCLUSION

Whether \textit{Escobedo} holds that the "guiding hand of counsel" during interrogation is an absolute right or whether denial by police of accused's request for counsel and failure to warn him of his right to remain silent renders a confession involuntary under the "totality of the circumstances" test is not clear. Although the Court pointed to the denial of defendant's request for counsel as the critical moment,\textsuperscript{72} such a request cannot be made the basis for the test of right to counsel since it would not protect the ignorant. If request were made the basis of the right to counsel, the defendant, confused by the arrest and interrogation, who does not explicitly demand counsel would be left unprotected.\textsuperscript{73} The Supreme Court in an earlier case said, "Where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."\textsuperscript{74} Therefore the

\textsuperscript{68} Miller v. State, 231 Md. 158, 189 A.2d 118 (1963).
\textsuperscript{70} Miller v. Warden, Md. Pen., 338 F.2d 201, 205 (4th Cir. 1964).
\textsuperscript{71} Id. at 204-05.
\textsuperscript{72} 378 U.S. at 479. "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel'."
\textsuperscript{74} Carnley v. Cochran, 369 U.S. 506, 513 (1962); see \textit{Escobedo v. Illinois}, 378 U.S. 478, 495 (1964) (White, J., dissenting). Request is irrelevant because once the
requirement that an accused must specifically request consultation with counsel as a prerequisite to enforcing his constitutional rights is clearly untenable, for in other situations the right to counsel, once established, has not depended on this factor.75

Since the request for counsel factor is untenable, can the Escobedo decision be read as requiring the presence of counsel at every arrest?76 The decision indicates that the presence of counsel during interrogation is required to assure that defendant's rights are effectively protected, even though a warning by police of the accused's right to remain silent and to counsel might in theory seem to afford adequate protection.77 However, this requirement does not stipulate that a lawyer must be stationed at every police precinct78 or that special interrogation boards, conducted in the manner of depositions in civil suits, be set apart from the investigative arm.79 Nor does Escobedo establish Judges' Rules similar to those in England in 1930 which required that a person in custody must not be questioned.80 Escobedo does not prohibit questioning once the accused has intelligently waived counsel.

It is obvious that a requirement of the presence of counsel at every arrest would create an insurmountable problem and would seriously hamper effective police action when such action is needed. A simple rule for the police to follow is that once persons under arrest have been brought to the station house, they should not be questioned regarding the facts of the offense until after appearance before a magistrate81 and appointment or retention of counsel or refusal to

right to counsel is established it must be intelligently waived. Lee v. United States, 322 F.2d 770 (5th Cir. 1963); The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 217–23 (1964); Broeder, supra note 73, at 607.


76. Justice White, dissenting, said:

"The right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused has become a suspect. From that very moment apparently his right to counsel attaches, a rule wholly unworkable and impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side." 378 U.S. at 496.

77. 378 U.S. at 487–90.

78. See The Coming of Massiah: A Demand for Absolute Right to Counsel, 52 Geo. L.J. 825, 848 (1964).


80. For a discussion of the English Judges' Rules, see Williams, op. cit. supra note 79. The Judges have given up enforcing their own rules, because they have proved to be an unreasonable restriction upon the activities of the police. Williams, Questioning by the Police: Some Practical Considerations, 1960 Crim. L. Rev. (Eng.) 325, 331–32. The old rules are in Devlin, The Criminal Prosecution in England 137–41 (1938). The modern rules appear in 1964 Crim. L. Rev. (Eng.) 166–70.

81. A magistrate is not a member of the investigative and accusatory arm of the state but is a judicial officer, usually under some supervision of the courts. He is not under pressure to obtain confessions and convictions as are the police. The magistrate would effectively advise the accused of his rights to remain silent and to counsel and would make sure that if the accused did waive his right, he did so with the understanding of the consequences. A record of these proceedings would be helpful to the courts in determining if the accused intelligently waived his rights and would also eliminate the conflicting testimony as to advising and waiver. See note 18 supra and accompanying text.
accept the assistance of counsel. Any plea or statement by an accused should not be admissible unless these conditions are met. To insure that there are no long delays between arrest and presentment of the accused before a magistrate, a rule similar to McNabb-Mallory, requiring presentment before a magistrate within a reasonable time after arrest, should be made applicable to the states. Escobedo is a move in the right direction.

82. See Acheson, United States Attorney for the District of Columbia, Memorandum to Chief Murray of the Metropolitan Police Department, Oct. 27, 1964.
83. See Brumbaugh & Ester, Indigent Accused Persons Project, Oct. 1964 (unpublished report to the Maryland Bar Association in Md. Law School Library). However, this would not mean that “threshold statements” voluntarily made would be inadmissible.
84. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957). The McNabb-Mallory rule has never been made applicable to the states. See Enker & Elsen, Counsel for the Suspect, 49 Minn. L. Rev. 47, 69-91 (1964), which criticizes the Escobedo decision as obscuring certain underlying constitutional issues by the use of the right to counsel and which suggests applying McNabb-Mallory to the states as an alternative.