Buffalo Law Review

Volume 18
Number 2 *Symposium: New York's New Penal Law*

Article 14

1-1-1969

Criminal Law—Denial of Counsel and Failure to Provide Adequate Warnings Regarding Constitutional Rights Have Important Bearing on Confessions Which Are Tested Under the Totality of Circumstances.

Edwin H. Wolf

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Constitutional Law Commons, Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation

Edwin H. Wolf, *Criminal Law—Denial of Counsel and Failure to Provide Adequate Warnings Regarding Constitutional Rights Have Important Bearing on Confessions Which Are Tested Under the Totality of Circumstances.*, 18 Buff. L. Rev. 373 (1969).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol18/iss2/14

This Recent Case is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

CRIMINAL LAW—DENIAL OF COUNSEL AND FAILURE TO PROVIDE ADEQUATE WARNINGS REGARDING CONSTITUTIONAL RIGHTS HAVE IMPORTANT BEARING ON CONFESSIONS WHICH ARE TESTED UNDER THE TOTALITY OF CIRCUMSTANCES.

John Herbert Greenwald was arrested on suspicion of burglary at 10:45 on the night of January 20, 1965. He was taken to a police station, questioned until midnight, then booked and fingerprinted. At 2:00 A.M. the next morning he was taken to a cell in the city jail. A plank attached to the wall served as his bed but he did not sleep. At 6:00 A.M. he was left in a "bull pen" for two and one half hours before being placed in a lineup. At 8:45 A.M. questioning, conducted by several officers in a small room, was resumed. For several hours Greenwald refused to answer any questions except to deny his guilt. He refused to write out a confession, stating that "it was against (his) constitutional rights," adding that he was "entitled to a lawyer." The statement evoked no response and was not repeated. Between 11:00 A.M. and 11:30 A.M. petitioner made a number of oral admissions and a full oral confession which was reduced to writing about 1:00 P.M. Petitioner received no warning as to his constitutional rights until after the oral confession and just prior to its reduction to writing. During this same brief period petitioner was offered food and taken to his home to change clothes.

Greenwald, nearly thirty, had a ninth grade education and was no stranger to the criminal law. He suffered from high blood pressure for which he took medication twice daily. None was available to him from the time of his arrest until his brief return home the following day. Petitioner testified that he confessed because he "knew they weren't going to leave (him) alone until (he) did."

Petitioner's conviction of two counts of burglary and one of attempted burglary was affirmed by the Wisconsin Supreme Court.[1] The Supreme Court of the United States, in a 6 to 3 per curiam opinion, reversed, *holding*, that considering the totality of circumstances it was not credible that the statements were a product of petitioner's free and rational choice. *Greenwald v. Wisconsin*, 390 U.S. 519 (1968).

The law of confessions has changed markedly since the 1500's when statements were freely admitted without regard to the circumstances or methods of extraction.[2] During the next two centuries a greater importance was placed on individual rights as the populace became increasingly aware of the use of physical brutality towards suspected criminals. Nevertheless, confessions were rarely excluded, even in the late 1700's unless elicited by promise, threat or physical abuse.

In the early 1800's significant change took place in the thinking of the

1. 35 Wis. 2d. 146, 150 N.W.2d 507 (1967).
2. 3 Wigmore, *Evidence*, §§818-820 (3d ed. 1940).

courts. Confessions were viewed with increased suspicion and were generally excluded because law enforcement agencies continued to disregard individual rights.[3] The common law rationale was that a confession would be excluded when it was untrustworthy. Confessions were regarded as untrustworthy in situations involving threats, violence or a promise of favorable treatment. Under these circumstances it was likely that a suspect would confess rather than suffer under continued fear or physical abuse. A promise of favorable treatment worked the same way. An innocent suspect might confess to receive a lighter sentence rather than risk a harsher result in a trial he might lose. Confessions elicited under these circumstances were held to be involuntary because there was a high probability that they might be untrue.[4]

In the United States the admissibility of a confession was measured by its reliability for quite some time.[5] In *Brown v. Mississippi*[6] the Supreme Court introduced the criterion under which confession could be excluded if it was extracted in a manner which denied due process to an accused. Thereafter, confessions were excluded on both grounds, untrustworthiness and denial of due process, although the trend was toward the latter.[7]

The last vestige of the common law rationale was discarded in *Rogers v. Richmond* when the Supreme Court announced:

> [W]hether . . . confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused . . . on the question whether the behavior . . . was such as to . . . bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner spoke the truth.[8]

Involuntary confessions are still excluded but the criterion is now due process, not reliability.[9]

---

3. *Id.* § 865. Physical coercion had nearly disappeared, but an accused had few of the rights he has today. There was no right of appeal, no right to counsel, no right to testify for oneself, and cross-examination of witnesses was allowed only by custom.
4. *Id.* § 822 and § 865.
5. Wilson v. U.S., 162 U.S. 613, 623 (1896), "[T]he true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort."; Note, 27 Fordham L. Rev. 396 (1958).
6. 297 U.S. 278 (1936).
7. Lisenba v. California, 314 U.S. 219, 236 (1941):

> The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. These vary in the several states. . . . But the adoption of the rule of [the state's] choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.

Note, 35 U. Colo. L. Rev. 256 (1963).

8. 365 U.S. 534, 543-44 (1961).
9. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

There is no single test which is adequate to determine if a confession is voluntary. Each case is *sui generis,* with the court examining the factual context. Some situations are so coercive that a confession is inadmissible as a matter of law. Such a situation results when a confession is physically coerced by the use or threat of violence.[10] A similar situation, one more difficult to resolve, occurs when the confession is psychologically induced.[11] As interrogation processes and other police methods grow more sophisticated, the problem facing the court becomes more complex. In an attempt to overcome this problem and to keep pace with refinements in interrogation methods the courts must use a more subjective test to determine the presence of a coercive atmosphere.[12] It is clear that a court must give its attention to all the circumstances surrounding the confession.[13] In Some cases coercion may be found from a single fact. In others, all the facts (the totality of circumstances) may indicate coercion even when no single fact is necessarily paramount in the decision.[14] Under the concept of

---

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. . . . If it is ["voluntary"] the use of [a] confession offends due process.

For an excellent treatment of the subject of confessions, see 79 Harv. L. Rev. 935 (1966).

10. Payne v. Arkansas, 356 U.S. 560 (1958) (Threatened that lynch mob was outside); Malinski v. New York, 324 U.S. 401 (1945) (Held in room while stripped to humiliate and frighten, threatened by physical violence); Ward v. Texas, 316 U.S. 547 (1942) (Slapped by constable, moved between three different jails to create fear of mob violence); Chambers v. Florida, 309 U.S. 227 (1940) (Questioned by 4 to 10 man teams of police and irate citizens); Brown v. Mississippi, note 6 *supra* (Hung twice and whipped).

11. Lynumn v. Illinois, 372 U.S. 528 (1963) (Accused told she could lose her children if convicted); Culombe v. Connecticut, note 9 *supra* (Moron, known to be subject to intimidation. Fear of codefendant and pressure from wife used to induce confession); People v. Spano, 4 N.Y.2d 256, rev'd. 360 U.S. 315 (1958) (Lifelong friend who was a police officer induced confession by trickery).

12. Some of the factors considered are illustrated in Davis v. North Carolina, 384 U.S. 737 (1966) (Low mental intellect, held incommunicado during 16 days of questioning); Harris v. South Carolina, 338 U.S. 68 (1949) (Illiterate questioned by relays of officers for 12 hours at a time in cubicle stifling with heat); Turner v. Pennsylvania, 338 U.S. 62 (1949), (Unlawful delay in arraignment); Haley v. Ohio, 332 U.S. 596 (1948) (15 year old held incommunicado and questioned 4 to 5 hours at a time by 5 to 6 police).

13. Haynes v. Washington, 373 U.S. 503, 513 (1963), "[C]oercion or improper inducement can be determined only by an examination *of all the attendant circumstances.*"; Gallegos v. Nebraska, 342 U.S. 55, 64 (1951), "A confession can be declared inadmissible . . . only when the *circumstances under which it is received* violate those fundamental principles of liberty and justice protected by the Fourteenth Amendment."; Hopt v. Utah, 110 U.S. 574, 583 (1884), "The admissibility of [a confession] so largely depends upon the *special circumstances* connected with the confession. . . ." (Emphasis supplied).

14. Haynes v. Washington, note 13 *supra* at 514.

> [T]estimony . . . permits no doubt that it was obtained under a totality of circumstances evidencing an involuntary written admission of guilt.

Culombe v. Connecticut, note 9 *supra,* at 606.

> [J]udgement as to legal voluntariness . . . under the Due Process Clause is drawn from the totality of the relevant circumstances . . . .

Fikes v. Alabama, 352 U.S. 191, 197 (1947).

> The totality of circumstances that precede the confession in this case goes beyond the allowable limit.

Bram v. U.S., 168 U.S. 532, 563 (1897).

> [T]hese facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole . . . they give room to the strongest inference [that they were not freely made].

totality of circumstances, the court reviews the whole record and all the facts in each case.[15] This is most significant, because the findings of fact are often no more than the judicial inferences of the trier of fact. To restrict the concept of totality of circumstances to findings of fact alone would prevent the reviewing court from drawing its own conclusions about the force of the circumstances on the personality of the accused.[16]

It has been said that

> . . . [O]nly one with an extravagant faith in the actual operation of the 'totality of circumstances' test could fail to see that the safeguards were largely illusory.[17]

It is extremely difficult to determine what constitutes a departure from proper practice and when any combination of factors would result in an inadmissible confession. A review of all the cases helps little in determining which of a group of circumstances is considered to be most important. Many of the decisions come from a divided Court and often there has been no majority opinion. The lack of any consensus in the Supreme Court is indicative of the inadequacy and uncertainty under the totality of circumstances test. Each case tends to become a matter of personal conviction rather than a matter of law based on judicial precedents.

In *Escobedo v. Illinois*[18] and *Miranda v. Arizona*[19] the Supreme Court adopted a different test for admissible confessions. These cases delineated the minimum procedural requirements to satisfy due process. *Escobedo* held that if a particular suspect, in custody, requests and is denied counsel and is not effectively warned of his constitutional rights, then no statement elicited from him may be used against him at criminal trial. *Miranda,* in reaffirming the *Escobedo* decision, broadened its scope in two significant ways. First, the defendent need not be in custody but only deprived of his freedom of action in any significant way. Second, the use of statements no longer depends on the request and denial of counsel but on the lack of a proper warning as to one's constitutional rights which must be given prior to any questioning.

---

15. Lisenba v. California, note 7 *supra* at 237-38.

> [W]here the claim is that the prisoner's statement has been procured by [threats or promises] . . . we are bound to make an independent examination of the record . . . [T]his duty [to examine the whole record] cannot be foreclosed by the findings of a court or the verdict of a jury or both.

19 Wash. & Lee L. Rev. 35 (1962).

16. Culombe v. Connecticut, note 9 *supra,* 605-06.

> [T]he mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially . . . and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel . . . .
>
> . . . [I]f force has been applied, this court does not leave to local determination whether or not the confession was voluntary. . . . [T]here comes a point where this Court should not be ignorant as judges of what we know as men.

17. 65 Mich. L. Rev. 59, 62.
18. 378 U.S. 478 (1964).
19. 384 U.S. 436 (1966).

If counsel is offered when the proceedings become accusatorial, then the accused will be better protected from denial of due process. In other words, the presence of counsel during the interrogation will help to eliminate much of the coercive character of the circumstances which used to surround a confession.

The instant case is one in which the confession was excluded on the basis of totality of circumstances. The decision of the Wisconsin Supreme Court was reversed on the petition for the writ of certiorari without giving the State the opportunity to brief or argue the question on the merits.[20]

Greenwald's trial took place in 1965, thus the *Miranda* decision did not apply.[21] Although the trial took place after *Escobedo* the Court chose not to ground its opinion on that case itself. The majority, considering only undisputed facts, found that Greenwald had lacked counsel and although he had mentioned a lawyer one had not been formally requested. In addition the Supreme Court considered that there had been an inadequate warning as to constitutional rights. These facts, coupled with petitioner's physical condition as a result of the lack of food, sleep and medication were considered to be relevant to the claim that the confession was involuntary.

The dissent viewed the circumstances differently, noting that the time period was just over 24 hours, during which there was questioning for less than four hours on one day and a little more than one hour on the other. There was no evidence of any threat or abuse, and no benefits were promised to induce the confession. Petitioner was not inexperienced in matters of criminal law. He was well aware of his constitutional rights to counsel and to remain silent, and he knew that his statements could be used against him. At no time did he request either food or medication. The dissent also noted that Greenwald's petition did not raise the question of whether his confession was admissible under *Escobedo.*

Greenwald is a case which is easily distinguished from those relied on by the majority of the Court. It seems to present a marginal factual situation for the exclusion of a confession under totality of circumstances standards. This is not to say that the relevant circumstances could not be coercive, but rather that to infer coercion as a matter of law is questionable. Even allowing for differences in judicial opinion it is hard to find a case similar to *Greenwald* in which the confession was inadmissible.

Clewis v. Texas,[22] cited by the majority, presents far more typical and compelling circumstances for a reversal of a conviction. In *Clewis*, as in many others before it, the defendant was an uneducated Negro accused of a capital crime in a southern state. The specific design was to elicit a confession by prolonged and protracted interrogation over a nine day period under trying conditions. Lack of food and sleep were a natural by-product of the duration of the interrogation. The accused, who appeared sick, was held for the whole time

20. 390 U.S. 519, 522 (1968).
21. Johnson v. New Jersey, 384 U.S. 719 (1966); (decided that *Escobedo* and *Miranda* were not to be applied retroactively.).
22. 386 U.S. 707 (1967).

with neither the advice of counsel nor the support of friend until broken in spirit and resistance. Arraignment was delayed unlawfully until the accused had made an inculpatory statement. *Clewis*, of course, was not warned of his constitutional rights until after he confessed.

Greenwald was in custody for a little more than 12 hours during which he was questioned twice, the maximum duration being less than four hours. There is no evidence of a specific intent to coerce a confession and Greenwald's discomforts were hardly severe. He had one sleepless night resulting from the modest sleeping facilities in the jail. His lack of medication was his own fault for he asked for none and did not advise the police of his illness. It is hard to see how the police could have avoided depriving Greenwald of medicine when they had no knowledge of his need.

Petitioner was not given breakfast by the police and received no food until he confessed. While this fact weighs in the petitioner's favor it is difficult to equate the absence of a single meal with an involuntary confession.

The majority considered that Greenwald had no adequate warning as to his constitutional rights and lacked counsel after a statement that he desired one. These two factors themselves would have mandated a reversal if the case at bar had occurred after *Miranda*.[23]

In the pre-*Escobedo* era, denial of counsel and adequate warnings as to rights were just two elements considered in the totality of circumstances. The trier of fact would have to decide if an accused were prejudiced or intimidated by these circumstances. In similar situations confessions made by persons experienced in the criminal law have been admitted, notwithstanding the denial of counsel, even after a formal request had been made.[24] It is likely that the conviction in the instant case would have been affirmed under prior rationale since Greenwald was well aware of his rights, familiar with police practices, and did not formally request a lawyer.

Even though petitioner's trial occurred after *Escobedo*, the Court noted that they "need not and do not decide whether [*Escobedo*] would in itself require reversal."[25] Accordingly, the Supreme Court implied that the findings of the lower court were correct and that Greenwald's reference to a lawyer was not sufficient to be considered a request for counsel so as to bring the instant case within the holding of *Escobedo*.[26] It is difficult to see why they felt the lower court exercised good judgment in this regard but erred in its judgment that the confession was voluntary. Little is gained by avoiding one question in favor of the other especially when both are equally difficult questions of judgment. A reversal on totality of circumstances grounds is no more supportable

23. *See* note 21 *supra*.
24. Cicenia v. LaGay, 357 U.S. 504 (1958) and Crooker v. California, 357 U.S. 433 (1958), which were the law until *Miranda*, note 19 *supra*, at 479 n.48.
25. 390 U.S. 519 n.1 and 2 (1968).
26. 150 N.W. 2d 509, 510, 511. (Undisputed that petitioner never formally requested counsel although his reference to a lawyer was close to a request. Escobedo holding was limited to the specific case where counsel was requested and denied.)

than one which might have found that Greenwald's statement was a request for counsel.

The dissent suggests that petitioner did not cite *Escobedo* and therefore the majority was wrong to consider it in its opinion. The Supreme Court should not be prevented from arriving at a proper decision because of an error or omission of citation especially in a case such as this where a layman prepared the petition for the writ of certiorari. The Supreme Court should always be free to cite the law of the land independent of the erudition and diligence of the adversaries. Certainly a court which can make an independent examination of the record to determine whether a confession is voluntary cannot be prevented from making a determination of the law independent of the accuracy of the petition. The days when cases were won and lost by the skill in preparing the pleadings has long since past.

It must be concluded that *Escobedo* played a major role in the decision, even though the Court couched its opinion in traditional totality of circumstances language. The case shows how far the *Escobedo* and *Miranda* decisions influenced the application of the totality of circumstances test even though those decisions were not directly applicable. Thus it may well be that the totality of circumstances test has been liberalized in the light of these decisions and that confessions will be more easily excluded when *Miranda* and *Escobedo* do not apply directly. In other words it appears that the Supreme Court will consider more closely the denial of counsel and failure to provide an adequate warning about constitutional rights in cases which arise between the decisions in *Escobedo* and *Miranda*. Even though these decisions are not to be applied retroactively they may have important bearing on confessions which are tested under the totality of circumstances standard.

EDWIN H. WOLF

LABOR LAW—PLANT REMOVAL—EMPLOYEES HAVE NO RIGHT TO REEMPLOYMENT AT NEW PLANT SITE BASED ON SENIORITY

Throughout the 1950's the Lux Manufacturing Company[1] periodically removed departments from its Waterbury, Connecticut plant to its other plants in Lebanon, Tennessee, and Canada; each removal resulting in layoffs of employees from the Waterbury plant. In March of 1961, for economic reasons, Lux transferred two departments from the Waterbury plant to the Lebanon plant, causing a susbtantial employee layoff at the Waterbury plant. In July of 1961, the assets of the Lux Company[2] were acquired by the Robertshaw Controls Company. Thereafter, pursuant to the March layoff, the union and certain of its individual members on behalf of themselves, brought an action in federal district

1. Hereinafter referred to as Lux.
2. Hereinafter referred to as Robertshaw.