Buffalo Law Review

Volume 15 | Number 3 Article 17

4-1-1966

Criminal Procedure—Confession of a Fourteen-year-old Held Not to Contravene Due Process; Availability of Coram Nobis when Conviction Rests on Guilty Plea of a Juvenile Left Unanswered

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CRIMINAL PROCEDURE—CONFESSION OF A FOURTEEN-YEAR-OLD HELD NOT TO CONTRAVENE DUE PROCESS; AVAILABILITY OF CORAM NOBIS WHEN CONVICTION RESTS ON GUILTY PLEA OF A JUVENILE LEFT UNANSWERED

On March 15, 1947, detectives of the Albany police department received certain information relating to the sensational murder of an eight-year-old boy. This information led to the home of petitioner, a boy who had not yet reached the age of fifteen. The police advised his parents that the boy was wanted for questioning; the subject matter of such questioning was not revealed. While driving petitioner to police headquarters, the police asked him what he had done with the clothes of the deceased boy. Petitioner's response was that he had thrown them in the creek. The police then drove the boy to the District Attorney's office where a full confession followed. Subsequent to the confession, petitioner's parents learned that their son's questioning involved a murder charge. Their requests to see petitioner were denied until just prior to the preliminary hearing when a short visit was permitted. Subsequent visits were denied until the day of petitioner's indictment. On arraignment for the indictment of first degree murder, a plea of not guilty was entered for petitioner and counsel was assigned. After many conferences with his parents and assigned counsel, petitioner withdrew his plea of not guilty and entered a plea of guilty to second degree murder. The reduced plea was accepted by the court and petitioner was sentenced accordingly. After sixteen years of imprisonment, he filed a petition for writ of error coram nobis vacating and setting aside the judgment of conviction rendered on his plea of guilty.[1] The basis for relief was that he was denied due process of law because his guilty plea was based on and induced by a confession that because of his tender years was in effect coerced. In a 4-3 decision the Court of Appeals *held* that petitioner was not denied due process of law; that the circumstances surrounding his confession "were fully explored in the coram nobis hearing and sympathetically considered, from the totality of which the only rational conclusion [was] that the confession was voluntary. . . ." The Court also found that the acceptance of the guilty plea to a reduced charge was a humane disposition of the case in light of the possibility of a first degree murder conviction and the mandatory death sentence. Thus disposing of the due process question, the Court proceeded to question the propriety of granting a coram nobis hearing to a defendant who, except for his age, falls squarely within the rule that a knowingly and voluntarily entered guilty plea precludes coram nobis relief.[2] The Court's discussion of the coram nobis issue is ambiguous and its determination, if any, remains unclear. *People v. DeFlumer*, 16 N.Y.2d 20, 209 N.E.2d 93, 261 N.Y.S.2d 42 (1965).

1. United States *ex rel.* DeFlumer v. LaVallee, 216 F. Supp. 137, 140 (N.D.N.Y. 1963), wherein petitioner in the instant case was denied habeas corpus on the ground of "lack of a sufficient showing that the state remedies had been exhausted."

2. People v. Nicholson, 11 N.Y.2d 1067, 184 N.E.2d 190, 230 N.Y.S.2d 220 (1962). The words knowingly and voluntarily are more perplexing than definitive.

The major issue presented by the instant case does not involve the frequent challenge to the admissability into evidence of a coerced confession. What petitioner contends is that his guilty plea was involuntary because the court in accepting it "knew of the circumstances of the confession and its influence in inducing the plea deprived him of due process of law."[3] The question presented is more clearly illustrated by petitioner's assigned counsel's statement at the time of acceptance of his guilty plea:

> When the assignment reached me, of course, there had been a confession; a confession by this juvenile taken late at night on the day that this offense occurred, without the aid of counsel, and without the guidance of parents, and I searched that I might be able to find there was no inflexible rule of law which would prevent me from attacking, at least, the legality of such a confession. But I found to my amazement I could get no comfort from the law, because everything was measured by the standard of adult responsibility.[4]

The question of the propriety of the adult standard as applied to juveniles was soon answered by the Supreme Court. In 1948 the Court decided *Haley v. Ohio*,[5] where the confession of a fifteen-year old boy, who had been told of his constitutional right to remain silent, was held involuntary. The Supreme Court stated,

> when . . . a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy . . . . He cannot be judged by the more exacting standards of maturity . . . . He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.[6]

The Court added that even if told of his rights it can't be assumed that a fifteen-year old boy would have a full appreciation of them. In *Gallegos v. Colorado*,[7] the Supreme Court stated that:

> a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.[8]

The Supreme Court has held that a conviction, following a trial or a guilty plea, based on a coerced confession is invalid under the due process clause.[9]

3. People v. DeFlumer, 16 N.Y.2d 20, 23, 209 N.E.2d 93, 95, 261 N.Y.S.2d 42, 45 (1965).
4. *Id.* at 23, 209 N.E.2d at 94-95, 261 N.Y.S.2d at 44 (1965).
5. 332 U.S. 596 (1948).
6. Haley v. Ohio, 332 U.S. 596, 599-600 (1948).
7. 370 U.S. 49 (1962).
8. Gallegos v. Colorado, 370 U.S. 49, 54 (1962).
9. *E.g.*, Herman v. Claudy, 350 U.S. 116, 118 (1956); Chambers v. Florida, 309 U.S. 227 (1940).

In another case monition was given that the trial judge always has the duty of making a determination according to correct constitutional standards.[10] Very recently the Supreme Court has affirmed the retroactive application of coerced confession grounds establishing denials of due process.[11] The New York Court of Appeals has been in accord with these Supreme Court determinations. In 1961 it reversed the 1943 conviction of a thirteen-year old based on a plea of guilty where it was revealed that he had been denied due process. In its decision the Court stated, ". . . in 1943, when the mere possibility of a conviction of a child for murder was shocking to contemplate, the taking of a guilty plea of murder from so young a defendant called for an extreme measure of caution and at least certainty of guilt and of the complete absence of any plausible defense."[12] In accord is *People v. Serrano*,[13] where the Court reversed a conviction of an adult based on a guilty plea where it was apparent to the Court that there remained doubt as to defendant's guilt. In *People v. Oliver*[14] the Court of Appeals dismissed the indictment against a fourteen year old boy charged with murder. This 1945 indictment was found to be against public and legislative policy manifest at the time of the crime. From analysis of the above decisions it is apparent that the Constitution prohibits determining the voluntariness of the confession of a juvenile by resort to the standard of adult responsibility and maturity. It is also apparent that where the standard used denies defendant due process of law, his conviction, notwithstanding a plea of guilty, cannot stand.

The second issue raised is whether a juvenile defendant can contest a due process violation in New York by the post conviction remedy of coram nobis, when his conviction rests on a plea of guilty. Coram nobis is the traditional remedy for setting aside a judgment where facts unknown at the time of trial, if known, would have affected the verdict.[15] Thus where the error was apparent on the record, coram nobis did not lie.[16] The remedy is one of paramount importance in New York where habeas corpus has narrow applicability. Habeas corpus in New York state courts is limited to cases where the court rendering the judgment lacked jurisdiction over the defendant or over the offense charged.[17] Beyond jurisdictional error its availability is questionable. "The New York version of *coram nobis* was born in *Lyons v. Goldstein*."[18] The Court held that it had inherent power to reopen a judgment based on trickery, deceit, coercion and fraud or misrepresentation in procure-

10. Rogers v. Richmond, 365 U.S. 534, 548 (1961).
11. Tehan v. United States, 382 U.S. 406 (1966).
12. People v. Codarre, 10 N.Y.2d 361, 365, 179 N.E.2d 475, 476-77, 223 N.Y.S.2d 457, 459 (1961).
13. 15 N.Y.2d 304, 206 N.E.2d 330, 258 N.Y.S.2d 386 (1965).
14. People v. Oliver, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956).
15. Frank, Coram Nobis (1953) Pars. 1.01-1.04.
16. People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957).
17. Morhous v. N.Y. Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1944).
18. Paulsen, *Winds of Change: Criminal Procedure in New York 1941-1965*, 15 Buffalo L. Rev. 297, 309 (1965).

ment of the plea upon which the judgment was based.[19] Immediately following *Lyons*, the Court of Appeals held that the proper remedy to question denials of due process of law was a motion to vacate the judgments made in the court which granted it.[20] In New York such remedy is a motion for writ of error coram nobis. In the case of *People v. Sullivan*,[21] coram nobis was held to be the emergency measure whereby a defendant could avoid the effects of an unlawful conviction when all other avenues of judicial relief were closed to him. In the area of coerced confessions, coram nobis was considered the proper motion when a defendant required *Jackson-Denno* relief.[22] These decisions of the Court of Appeals pointed to coram nobis as the motion to compensate for the limited availability of habeas corpus. However, recent decisions of the Court, with rare exception, have all but limited coram nobis to its traditional scope.[23] Where a defendant knowingly and voluntarily enters a plea of guilty he is precluded from coram nobis relief, though he contends a coerced confession induced such plea.[24] The Appellate Division in the instant case made it clear that youth is no exception to the above rule.[25] Such clarity is lost in the Court of Appeals decision and final determination on this exception by the Court must wait.[26] The scope of coram nobis in New York, in relation to both juveniles and adults, remains undefined. Probably the most elucidating statement of its scope was made by Chief Judge Desmond. He stated that, "because of the distinctions heretofore made and now being made as to various post conviction remedies in criminal cases, no clear rule or rules exist and each case must be decided according to its own equities."[27] It has been stated that "the New York Court of Appeals has not fulfilled its duty under the federal constitution to provide state prisoners with a state remedy to vindicate all federal constitutional rights."[28] Unless the dissenting statement of Judge Burke in the instant case, that "*coram nobis* is the appropriate remedy where a defendant has been denied due process of law," becomes a judicial reality in New York, redress will have to be left to the federal courts.[29] The availability of such redress has been both clarified and expanded by the Supreme Court in *Fay v. Noia*,[30] where the Court stated that, "if the States withhold effective

19. Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943).
20. Morhous v. N.Y. Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1944).
21. 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957).
22. People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).
23. People v. Griffin, 16 N.Y.2d 508, 208 N.E.2d 179, 260 N.Y.S.2d 447 (1965); People v. Rogers, 15 N.Y.2d 690, 204 N.E.2d 334, 256 N.Y.S.2d 136 (1965); People v. Nicholson, 11 N.Y.2d 1067, 184 N.E.2d 190, 230 N.Y.S.2d 220 (1962); People v. Shapiro, 3 N.Y.2d 203, 144 N.E.2d 12, 165 N.Y.S.2d 14 (1957).
24. People v. Nicholson, 11 N.Y.2d 1067, 184 N.E.2d 190, 230 N.Y.S.2d 220 (1962).
25. People v. DeFlumer, 21 A.D.2d 959, 251 N.Y.S.2d 814 (3d Dep't 1964).
26. People v. DeFlumer, 16 N.Y.2d 20, 209 N.E.2d 93, 261 N.Y.S.2d 42 (1965).
27. People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957) (Desmond C.J., concurring).
28. Paulsen, *supra* note 18, at 312.
29. People v. DeFlumer, 16 N.Y.2d 20, 23, 209 N.E.2d 93, 95, 261 N.Y.S.2d 42, 45 (1965) (Burke J., dissenting).
30. 372 U.S. 391 (1963).

remedy [for denials of due process], the federal courts have the power and the duty to provide it."[31]

Petitioner first sought relief in the federal courts through habeas corpus. Relief was denied on the ground that petitioner failed to show that the state court remedies had been exhausted.[32] A coram nobis hearing was granted by the New York County Court. The court held that petitioner's youth excepted him from the general rule that a plea of guilty waives the right to coram nobis relief. In determining the voluntariness of the confession and its effect on the subsequent plea of guilty, the court proceeded on the proposition that petitioner was entitled to the same constitutional standards as if the case arose today. In light of petitioner's youth, the evidence introduced on his behalf was treated as establishing a prima facie case and the burden of proof shifted to the people. Determining the standard for adjudging the voluntariness of the confession, the court stated that though petitioner was below fifteen years of age, he was successfully going through the first year of high school and was an average student; that he remained composed and showed no signs of nervousness through the questioning period; and that he was not an immature panicky child. The time between the initial police directed questioning and the confession was disputed. The court considered the present prominant positions held in the community by the then District Attorney and Assistant District Attorney, the reliability of the testimony of retired police officers and concluded the time interim was quite reasonable. The court felt that the competence of petitioner's assigned counsel could not be questioned. He was an attorney of prominence, who later became a judge and a prime mover in the establishment of the children's court. The relevance of the denials of parental requests to see the child were considered. The court stated that since the requests were subsequent to the confession their denial was irrelevant. The county court denied the relief sought, holding the confession voluntary and therefore no violation of due process.[33] The Appellate Division affirmed the order denying relief, adding alternative grounds. It agreed with the county court's determination on voluntariness and with the standard applied. However, the Appellate Division also determined that on the record it could not reasonably be found, no matter how the statements were made, that they forced or coerced the guilty plea. The court proceeded to differ with the county court and thereby found a further ground for denying relief. The court held that the petitioner's youth was no exception to the *Nicholson* rule, that a knowingly and voluntarily entered guilty plea precludes coram nobis and other post conviction remedies, though such plea be induced by a coerced confession. It therefore found that coram nobis relief would be denied in any event.[34] The Court of Appeals affirmed in a 4-3 decision and dismissed the writ of error. The

31. Fay v. Noia, 372 U.S. 391, 441 (1963).
32. United States *ex rel.* DeFlumer v. LaVallee, 216 F. Supp. 137, 140 (N.D.N.Y. 1963).
33. People v. DeFlumer, 40 Misc. 2d 732, 243 N.Y.S.2d 893 (Albany County Ct. 1963).
34. People v. DeFlumer, 21 A.D.2d 959, 251 N.Y.S.2d 814 (3d Dep't 1964).

majority opinion upheld the fairness of the coram nobis hearing and concurred in its result as to voluntariness. It also considered that under the standards of due process existing at the time, the judge, in accepting the plea, followed a humane course of action. Finding "the plea was voluntary and deliberate and made with the single purpose of avoiding the risks incident to a trial on the indictment" the Court held that there was no denial of due process of law. The majority then treated the question of the availability of coram nobis to a juvenile defendant whose conviction rests on a plea of guilty. This portion of the opinion is so ambiguous that no determination is discernible. The Court seems to limit its treatment of the issue to a restatement of defense counsel's distinguishing argument of age and a statement of contrary considerations. However, from the tone of the opinion, it is probable that the Court would, if it was required to, deny the defense counsel's argument that youth is an exception to the *Nicholson* rule.[35] Thus the county court's grant of a coram nobis hearing delayed determination of the coram nobis issue by affording the Court the due process ground for decision. Judge Burke took issue with the majority stating that "the guilty plea of this defendant cannot stand on proceedings wherein all concerned in a mistaken belief applied prohibited constitutional standards . . . ."[36] The fact that two weeks prior to the acceptance of petitioner's plea the Supreme Court had granted certiorari in the case of *Haley v. Ohio*, involving the applicability of adult standards to a juvenile, should have put the accepting judge on notice. It is also pertinent that seven months later that case decided that adult standards were inapplicable. Judge Burke felt that the court after having its attention focused on the presence and forcing effect of the confession should have either rejected the plea or at least taken it under advisement. He also felt that the court should have taken notice of the earnest discussions of the legislature on a proposed bill to abolish the trying of children between seven and fifteen for homicide. The bill was passed in 1948 too late to have effect on petitioner. Judge Burke also said that notice should have been taken of the strong public criticism of the existing law made apparent in its reaction to an unreported 1946 decision in Queens County. The Judge concluded that the standard applied to petitioner's confession by all previous courts concerned denied him his fundamental rights. Differing from the majority, Judge Burke also treated the *Nicholson* rule directly. He distinguished the instant case from *Nicholson* on the ground that in the instant case as opposed to *Nicholson* the convicting judge was made plainly aware by defense counsel of the need for caution in accepting a plea based on the tainted legality of the confession of a juvenile. Chief Judge Desmond in a separate dissent concurred with Judge Burke, adding specific New York precedents. Reference was made to a similar case in 1945. Defendant there was fortunate enough to have had his case postponed and thereby have the Court apply, not the 1948 amendment, but the legislative policies and gubernatorial

35. People v. DeFlumer, 16 N.Y.2d 20, 209 N.E.2d 93, 261 N.Y.S.2d 42 (1965).
36. *Id.* at 24, 209 N.E.2d at 95, 261 N.Y.S.2d at 46 (1965) (Burke J., dissenting).

statements accompanying it that condemned indictments of juveniles for homicide.[37] Judge Desmond saw great inequity in dismissing the indictment there and affirming the conviction here.[38]

In 1943 New York enacted a statute prohibiting the trial of children below the age of fifteen as adults for all criminal charges except those mandating a life sentence or state execution. The legislature felt that the public was not yet ready to eliminate the trial of juveniles for the heinous crimes requiring such harsh punishment.[39] During the ensuing years a change in public opinion became apparent. In the 1946 unreported case of *People v. Turk* the public and even the prosecuting attorney expressed their repulsion to the irreparable harm and exposure accompanying the trial of a child for homicide.[40] This attitude of the special treatment of children came to a head in the confession area when two weeks before the arraignment of the petitioner in the instant case the Supreme Court granted certiorari to review the conviction of a fifteen year old based on a confession judged on adult standards of maturity. The decision in that case denied the application of adult standards to a juvenile, but was handed down a few months too late for DeFlumer.[41] It was also clear that for two years prior to the enactment of the 1948 amendment to the penal law, prohibiting the trial of children below fifteen years of age for homicide, the legislature was engaged in earnest discussion as to the propriety of such juvenile trials.[42] The statutory amendment was passed too late to be applicable to DeFlumer and was held not retroactive.[43] These circumstances illustrate the trend in the treatment of juveniles when the petitioner was brought before the arraigning judge. Seemingly unattentive to the pervading atmosphere of the times, the judge considered petitioner's confession and its possible adverse effects at trial by *adult* standards. Applying this standard the judge's acceptance of a guilty plea to a reduced charge was apparently a humane disposition. However, there is no doubt that the adult standard is not the measurement of voluntariness applicable to the confession of a juvenile and that the trial judge ignored circumstances requiring judicial notice and acted under a mistaken belief in applying the adult standard.[44] No matter how humane the trial judge's disposition and no matter how sympathetic the county court was in considering the confession of this juvenile, they applied a standard of maturity the Supreme Court has held inapplicable to a juvenile. It is clear from the Supreme Court opinions in the

37. People v. Oliver, 1 N.Y.2d 152, 162, 134 N.E.2d 197, 204, 151 N.Y.S.2d 367, 374 (1956).

38. People v. DeFlumer, 16 N.Y.2d 20, 26, 209 N.E.2d 93, 96, 261 N.Y.S.2d 42, 47 (1965) (Desmond C.J., dissenting).

39. N.Y. Pen. Law §§ 486, 2186.

40. N.Y. State Legislative Annual, 1948, p.217; N.Y. Sess. Laws 1948, ch. 554; N.Y. Sess. Laws 1949, ch. 388, § 2186.

41. Haley v. Ohio, 332 U.S. 596 (1948).

42. N.Y. State Legislative Annual, 1948, p.217.

43. People v. Keitt, 31 Misc. 2d 931, 222 N.Y.S.2d 621 (Ct. Gen. Sess. 1961); People v. Downie, 205 Misc. 643, 130 N.Y.S.2d 362 (Kings County Ct. 1954).

44. See People v. DeFlumer, 16 N.Y.2d 20, 24, 209 N.E.2d 93, 95, 261 N.Y.S.2d 42, 47 (1965) (Burke J., dissenting).

Haley[45] and *Gallegos*[46] cases that the voluntariness of a confession of a juvenile cannot be adjudged on the more exacting standard of maturity. The county court's words conflict with these Supreme Court precedents. In considering the evidence the county court stated

> . . . in many respects this defendant was mature for his age even though he was still a couple of weeks short of attaining his 15th birthday. It cannot logically be argued that the same standard should have been applied to him as to . . . one who lacked the composure and relative poise demonstrated by this defendant. . . .[47]

This statement cannot be reconciled with the statement of the Supreme Court that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police."[48] The county court attributed to this fourteen year old boy maturity not found in children of what the Supreme Court described as the "difficult age for a boy."[49] The confession procured from a boy below fifteen years of age in the absence of parents, friends or counsel should be held to contravene the due process guarantees and a plea of guilty resting on the fear of its use in a criminal trial should be adjudged coerced.[50] "[A] new trial is now impossible and the only way of dealing with this situation (18 years' imprisonment for a 15-year-old boy) is to reverse, grant the petition and dismiss the indictment.[51] In the contrary determination of the majority opinion of the Court of Appeals, there is no authority cited and no attempt made to distinguish the Supreme Court precedents noted above. *Quaere*, what if the Court of Appeals had found a denial of due process, would petitioner's guilty plea have precluded coram nobis relief? The case that stands for the rule that a knowingly and voluntarily entered plea of guilty precludes coram nobis and all other post conviction remedies is *People v. Nicholson*.[52] In its essence *Nicholson* denies a defendant all avenues of redress for constitutional deprivations underlying a plea of guilty. The Court of Appeals devoted all of one page to this vastly important decision. One commentator has recently challenged the basis for the *Nicholson* rule. "It is difficult to see how an inquiry into the issue of coercion is properly blocked by offering a plea of guilty which itself was produced by the very illegality which inquiry might establish."[53] The failure of New York courts to afford a defendant remedies for constitutional violations when his conviction rests on a guilty plea is in effect a delegation to the federal courts. The district court in

45. Haley v. Ohio, 332 U.S. 596 (1948).
46. Gallegos v. Colorado, 370 U.S. 49, 54 (1962).
47. People v. DeFlumer, 40 Misc. 2d 732, 738, 243 N.Y.S.2d 893, 898-99 (Albany County Ct. 1963).
48. Gallegos v. Colorado, 370 U.S. 49, 54 (1962).
49. Haley v. Ohio, 332 U.S. 596, 599 (1948).
50. Gallegos v. Colorado, 370 U.S. 49 (1962) (by implication).
51. People v. DeFlumer, 16 N.Y.2d 20, 26, 209 N.E.2d 93, 97, 261 N.Y.S.2d 42, 47 (1965) (Desmond C.J., dissenting).
52. 11 N.Y.2d 1067, 184 N.E.2d 190, 230 N.Y.S.2d 220 (1962).
53. Paulsen, *supra* note 18, at 308.

the instant case stated that it would take jurisdiction if the state court remedies were exhausted.[54] It denied jurisdiction considering that "if this [district] court has jurisdiction, it would seem that the state court should also assume it."[55] The district court also stated "it cannot be assumed that this fourteen year old defendant waived a violation of his constitutional rights nor can he be charged with any failure to overrule the decision of his experienced counsel which was prompted by his understanding of the decisions then available to him."[56] If the Appellate Division decision on the coram nobis issue is to become or is the law in New York, the district court assumptions fall by the wayside. It would follow that if the federal court grants jurisdiction the New York courts might not, and that a fourteen year old can waive violations of his constitutional rights for failure to overrule the decision of his experienced counsel. It is clear from the presence of the *Nicholson* rule that New York has not fulfilled its obligation to afford remedies that will rectify constitutional deprivations. It can be said that the duty placed on the trial judge in New York in accepting a plea of guilty, to determine the absence of a plausible defense and the certainty of guilt,[57] makes the *Nicholson* rule more palatable. This must presume however that the trial judge is infallible, for his decision is final in relation to the availability of post conviction remedies. In the instant case, assuming the presence of a coerced confession inducing the petitioner to plead guilty and the Appellate Division's denial of coram nobis as the law, where is this juvenile's remedy for a violation of his constitutional rights? *Quaere* whether the trial judge's duty makes a denial of relief above any more palatable. The defense counsel did not clearly allege nor did the courts consider the possible denials of right to counsel and the failure of law enforcement officers to advise petitioner of his constitutional right to remain silent. The New York courts require that a defendant be advised of his right to counsel and privilege to remain silent upon arraignment and preliminary hearing.[58] Also, any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by counsel has been held fundamentally unfair.[59] The question raised by the instant case is whether this juvenile defendant had a right to counsel and to be advised of his privilege to remain silent when he was taken into police custody and his interrogation because accusatorial. The Supreme Court in *Escobedo v. Illinois* [60] held

> . . . that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confes-

54. United States *ex rel.* DeFlumer v. LaVallee, 216 F. Supp. 137 (N.D.N.Y. 1963).
55. *Id.* at 140.
56. *Id.* at 140.
57. People v. Serrano, 15 N.Y.2d 304, 206 N.E.2d 330, 258 N.Y.S.2d 386 (1965); People v. Codarre, 10 N.Y.2d 361, 179 N.E.2d 475, 223 N.Y.S.2d 457 (1961).
58. Birzon, Kasanof & Forma, *The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State*, 14 Buffalo L. Rev. 428, 430 (1965).
59. People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).
60. 378 U.S. 478 (1964).

> sion—our adversary system begins to operate, and, . . . the accused must be permitted to consult with his lawyer.[61]

New York represents those jurisdictions that construe the *Escobedo* decision strictly. New York requires the defendant to request counsel before his constitutional rights arise.[62] California illustrates the liberal interpretation of *Escobedo*. In cases brought before its courts, where the necessary factors described in *Escobedo* are present, California places an affirmative duty on its law enforcement officers to advise the accused of his right to counsel and privilege to remain silent.[63] The question as to which interpretation will be the correct constitutional guarantee will soon be decided by the Supreme Court.[64] There seems no cogent reason in a society like ours to require a man, no less a juvenile, to request a right guaranteed him by the Constitution. In the case of a fifteen year old boy, as the Supreme Court in *Haley* considered, not even the mere advisement of his constitutional rights is enough.[65] A juvenile must be afforded more protection than the mere statement of rights that he cannot be expected to fully understand. If the Supreme Court decides that request is necessary under the *Escobedo* decision,[66] petitioner has still been denied due process of law. The instant case has been summed up quite well by Professor Paulsen in a recent article: "Without much doubt the confession was taken in violation of constitutional standards as they are understood today. . . . It is hard to see, in these circumstances, how a guilty plea should block the assessment of the underlying confession in collateral proceedings."[67]

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61. Escobedo v. Illinois, 378 U.S. 478, 482 (1964).

62. People v. Jackson, 46 Misc. 2d 742, 262 N.Y.S.2d 907 (Sup. Ct. 1965); see also People v. Failla, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). *But see* People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965) wherein the New York rule requiring request was shown to be more practical than logical.

63. People v. Stewart, 62 Cal. 2d 571, 43 Cal. Rptr. 201, 400 P.2d 97 (1965) *cert. granted*, 382 U.S. 937 (No. 584, 1965 Term); People v. Dorado, 62 Cal. 2d 350, 42 Cal. Rptr. 169, 398 P.2d 361 (1965), *cert. denied*, 381 U.S. 937 (1965).

64. People v. Stewart, 62 Cal. 2d 571, 43 Cal. Rptr. 201, 400 P.2d 97 (1965), *cert. granted*, 382 U.S. 937 (No. 584, 1965 Term).

65. N.Y. State Legislative Annual, 1948, p. 217.

66. Commonwealth v. Negri, 419 Pa. 117, 213 A.2d 670 (1965) wherein the no request interpretation of *Escobedo* was held by the Pennsylvania Supreme Court to be *not* retroactive.

67. Paulsen, *Winds of Change: Criminal Procedure in New York 1941-1965*, 15 Buffalo L. Rev. 297, 308-09 (1965).