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Goldberg: Escobedo and Miranda Revisited
ESCOBEDO AND MIRANDA REVISITED

by

ARTHUR J. GOLDBERG*

Shortly before the close of the 1983 term, the Supreme Court of the United States decided two cases, *U.S. v. Gouveia*¹ and *New York v. Quarles*², which in effect overruled *Escobedo v. Illinois*³ and undermined *Miranda v. Arizona*⁴.

In a somewhat cavalier fashion, Justice Rehnquist dismissed both of these opinions in a footnote which reads:

The only arguable deviations from consistent line of cases are *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964). Although there may be some language to the contrary in *United States v. Wade*, 388 U.S. 218 (1967), we have made clear that we required counsel in *Miranda* and *Escobedo* in order to protect the Fifth Amendment privilege against self incrimination rather than to vindicate the Sixth Amendment right to counsel. See *Rhode Island v. Innis*, 446 U.S. 291; 300 n. 4 (1980); *Kirby v. Illinois*, 406 U.S. at 689; *Johnson v. New Jersey*, 384 U.S. 719, 729-730 (1966).⁵

In this footnote, and, in the body of the *Gouveia* opinion, Justice Rehnquist, for the Court, is in error on several grounds.

Escobedo was not a fifth amendment case. Indeed the fifth amendment was never mentioned in the Court's opinion. It was plainly and simply a sixth amendment case.

In the opening words of the *Escobedo* opinion, the Court said:

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' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S. 335, 342, and thereby renders in-

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¹104 S. Ct. 2292 (1984).

²104 S. Ct. 2626 (1984).

³378 U.S. 478 (1964).

⁴384 U.S. 436 (1966).

⁵104 S. Ct. 2292, 2298 n. 5 (1984).

admissible in a state criminal trial any incriminating statement elicited by the police during the interrogation.⁶

In concluding the opinion, which I wrote for a majority of the Court, I said:

Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' *Spano v. New York*, 360 U.S. 315, 327 (Stewart, J., concurring), by gathering information from witnesses and by other investigative efforts.' *Haynes v. Washington*, 373 U.S. 503, 519. We hold only 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.⁷

To compound the footnote error Judge Rehnquist also, speaking for the Court, said that "The right of counsel does not attach until the initiation of adversary judicial proceedings," i.e. until an indictment has been brought.⁸

In *Escobedo*, however, the Court said:

The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, the fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation has ceased to be a general investigation of 'an unsolved crime'. *Id.*, at 485 (citation omitted) (quoting *Spano v. New York*, 360 U.S. 315, 327 (1960) (Stewart, J., concurring)).⁹

It is simply not possible to explain the difference in these holdings by describing *Escobedo* as an "arguable deviation."¹⁰ The only tenable explanation is that *Gouveia* overrules *Escobedo*.

The facts in *Gouveia* illuminate that this is indeed so. The record and the fact findings of the trial District Judge, and the court of appeals reviewing this decision, disclose that the respondents in *Gouveia* were committed to administrative detention because "the finger of suspicion" was pointed at them and that they were put in solitary and interrogated, not to promote prison discipline, nor to ensure prison security, but because they were the prime suspects to the murders of fellow inmates.

Although they were thus fingered as the accused and intensely interrogated, they were not indicted until months later, although some of the respondents were in administrative detention for almost nineteen months. During

⁶378 U.S. 478, 479 (1964).

⁷378 U.S. 478, 492 (1964).

⁸104 S. Ct. 2292, 2298 (1984).

⁹378 U.S. 478, 485 (1964).

¹⁰104 S. Ct. 2292, 2298 n. 5 (1984).

this period, because they were indigents, and thus could not afford lawyers, these inmates were denied the right of counsel in violation of the *Escobedo* holding. But, as I have pointed out, Justice Rehnquist dismisses their sixth amendment claim because he believes that the sixth amendment right of counsel does not attach until indictment.

Escobedo was one of the Warren Court's outstanding decisions. If overruled, as it was in *Gouveia*, it was entitled to a more seemly demise than that accorded by a cursory reference and an erroneous footnote.

In deciding the *Quarles* case during the final days of the 1983 Term, the Court once again ignored prior caselaw, in that instance *Miranda*, to limit still further the rights of criminal suspects.

Miranda was a fifth amendment case, as was *Quarles*. *Quarles* was tried in a New York court for rape and illegal possession of a gun. The relevant facts are stated in the opinion of the Court.

A young woman approached police officers who were on patrol, in a police car, in Queens, New York. She told them she had just been raped by a black male. She further reported to the officers that the man had just entered an A&P supermarket located nearby and that he was carrying a gun. The officers accompanied the woman to the supermarket, and one of the officers entered the store while the other radioed for assistance. The officer entered the store quickly and spotted the respondent, who matched the description given by the woman.

Upon seeing the officer, the respondent turned and ran to the rear of the store. The arresting officer pursued him with a drawn gun. He apprehended the suspect, frisked him and discovered that he was wearing an empty shoulder holster. After handcuffing him, the arresting officer ordered him to disclose where the gun was. Respondent pointed to some empty cartons and responded "the gun is over there."¹¹ The officer, thereupon retrieved a loaded revolver from one of the cartons, formally placed respondent under arrest and then read him his *Miranda* rights from a printed card.

Respondent then, in response to further questions, confessed that he owned the gun and had purchased it in Florida. Despite this obvious *Miranda* violation, Justice Rehnquist, writing for the Court, held that the *Miranda* warning was not required when interrogation commenced because of the "good faith" of the arresting officers based on their justifiable concern "for the public safety."

Justice Rehnquist explained that "whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which

¹¹104 S. Ct. 2626, 2628 (1984).

police officers ask questions reasonably prompted by a concern for the public safety."¹²

Inasmuch as the suspect was handcuffed and a body search indicated that he had no other weapons, the public safety explanation is not credible.

The only tenable conclusion is that the Court is determined to limit or overrule *Miranda* by erosion.

The decisions Justice Rehnquist cites in *Gouveia* in support of the view he expressed for the Court, that in virtually all cases an indictment is required before the sixth amendment right to counsel can be invoked are inapposite.¹³

In support of his holding, Justice Rehnquist cites a statement from *Kirby v. Illinois*¹⁴ that the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated." But as Justice Stevens noted in his concurring opinion on *Gouveia*, the plurality opinion in *Kirby* was not joined by a majority of the Court.¹⁵ The same is true of the passage quoted by Justice Rehnquist from *United States v. Mandujano*.¹⁶ Two other decisions relied upon by Justice Rehnquist, *Estelle v. Smith*¹⁷ and *Moore v. Illinois*¹⁸, in Justice Stevens apt analysis, "merely describe what the Kirby plurality had required for the Sixth Amendment to attach, and held that the plurality's test was satisfied."¹⁹ Moreover, as Justice Stevens further observed, in neither *Estelle* nor *Moore* did the Court consider whether the right to counsel could attach "prior to the point identified by the Kirby plurality."²⁰ Rehnquist cited one other case in support of his view, *Brewer v. Williams*²¹, but this case left the question open, and therefore, adds no support to his conclusion.

Faced with the Court decision in *Escobedo* that contradicts his own interpretation, Justice Rehnquist dismissed *Escobedo*, and also *Miranda*, which reaffirmed the *Escobedo* holding as "arguable deviations."²² The words "arguable deviations" seems to me a sleight of hand to obscure the Court's effort to overrule *Escobedo* and circumscribe *Miranda*.

¹²104 S. Ct. 2626, 2632 (1984).

¹³104 S. Ct. 2292, 2298 (1984).

¹⁴406 U.S. 682 (1972).

¹⁵104 S. Ct. 2292, 2302 n. 3 (1984).

¹⁶425 U.S. 564 (1976).

¹⁷451 U.S. 454 (1981).

¹⁸434 U.S. 220 (1977).

¹⁹104 S. Ct. 2292, 2302 n. 3 (1984).

²⁰*Id.*

²¹430 U.S. 387 (1977). In *Nix v. Williams*, 104 S. Ct. 2501 (1984), the Court held that the inevitable discovery exception to the exclusionary rule applies to violations of the sixth amendment right to counsel. The Court did not directly address the issue of at what point the right to counsel attaches, but found that there was no unfairness where the State and the accused are placed in the same position they would have been in had the impermissible conduct not taken place.

²²104 S. Ct. 2292, 2298 n. 5 (1984).

Justice Rehnquist's dismissal of *Escobedo* may stem, in part, from the *Miranda* decision's references to the fifth amendment privilege against self incrimination, as well as the sixth amendment requirement of the assistance of counsel.

The *Miranda* Court expressly reaffirmed its previous holding in *Escobedo*, but *Miranda*'s emphasis on warnings, while welcome, may unfortunately have served to dilute the essential premise of *Escobedo*.

Miranda holds that a criminal suspect's constitutional rights can be protected by a warning alone against self incrimination, provided the warning is accompanied by an affirmation of the right to counsel. This was not the holding of *Escobedo*, which explicitly stated that the sixth amendment right to the assistance of counsel guarantees this right to criminals, who are the prime suspects, before interrogation.

I do not mean by this to denigrate the value of *Miranda* warnings. Warnings, including the reference to right of counsel, are useful and may indeed protect a citizen from unwittingly incriminating himself. Warnings are, however, far less important than the absolute right to the assistance of counsel during pretrial interrogation of a suspect who is the focus of a criminal investigation.

Miranda warnings, as experience teaches, have limited utility. Lay persons, in police custody, simply cannot anticipate how what they agree to say will be used against them later. Such suspects, more often than not, do not comprehend the significance of a *Miranda* warning, because they lack the legal training or often even literacy needed to understand the different ways statements can incriminate them.

Further, we have no way of knowing what else the police may have added after a *Miranda* warning. A most common statement by police, almost never taped or admitted, is that if the suspect "cooperates" the police will intercede for a lighter sentence.

In *Escobedo*, for example, the suspect was told that if he fingered the person who actually pulled the trigger, he would be sent home, in disregard of the well settled rule that all participants in a felony resulting in a murder are equally guilty of this grave crime, although he did not use or even possess the murder weapon. More than a warning, what a criminal suspect needs, and under the sixth amendment is entitled to, is the assistance of counsel before indictment and trial.

If the suspect does not receive such assistance and unwittingly makes a statement in which he implicates himself, the assistance of counsel at trial may do no good because the trial's outcome may well have become a foregone conclusion. The trial, thereby loses its significance and is reduced simply to an appeal from the pretrial interrogation. The Soviets use such an approach in their criminal justice system but it does not follow, however, that we should do the

same. Such an approach is completely inconsistent with our belief in the rule of law and in the safeguards of our cherished Bill of Rights.

Realistically, only the assistance of counsel, who can explain fully to the suspect the possible legal ramifications of any admission, can prevent criminal trials from evolving into a pro forma ratification of prior police investigations.

It would seem apparent that *Escobedo* has been overruled by *Gouveia*. And it also seems that *Quarles* grants law enforcement officers a "good faith" exemption from the *Miranda* ruling, thus limiting *Miranda's* application. Most police officers believe that they act in good faith and with justifiable concern for the public safety in disregarding what they term "legalism," an inapt characterization of a *Miranda* warning. Juries, more often than not, accept the police testimony rather than that of the person in the dock who rarely looks or talks like a law abiding citizen.

In sum, it appears to me, that the present Court has consigned *Escobedo* to the ash heap of legal history and *Miranda* is twisting slowly in the wind.
