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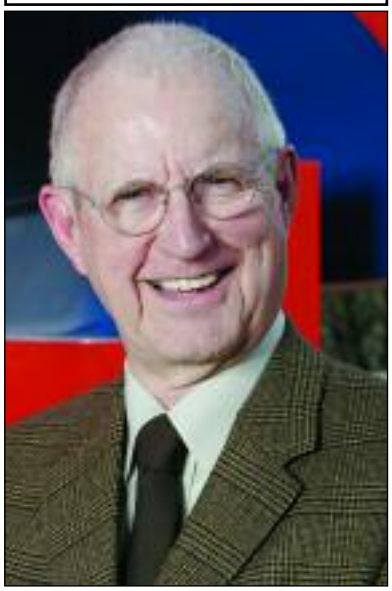

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BY HON. WILLIAM SCHAFER

When Legal Advice Is Most Critical

Do you remember where you were on the 22nd of June, 1966? I do. I was driving across the United States trying to get to New Jersey for a vacation. It was somewhere in Kansas when I heard it: "This is a bulletin. The United States Supreme Court today has struck down all confessions given without a lawyer present. A spokesman for the Court has said the Court held in a case from Arizona that any confession given without the defendant first being warned that he has a right to a lawyer is constitutionally invalid. We repeat…." It was the Miranda *decision.*

At that time I was Chief Deputy in the Pima County Attorney's office in Tucson. My office prosecuted hundreds of criminal cases a year. That bulletin sent us into a dither for weeks; we couldn't begin to guess what was coming next … Jails were unconstitutional? Punishment was unconstitutional? We were ready to believe almost anything.

So, in the midst of all this I wrote a completely fake United States Supreme Court opinion, sneaked it into the office, and sat back and waited for people to read it. I thought a few would see it, laugh, and then pass it on. But they didn't; they read it but no one saw the joke. They believed it. I was so embarrassed I didn't tell anybody until the next day.

Here it is. See what you think.

HEADER: OCTOBER TERM, 1966 Cite as: 384 U.S. 550 (1966)

SUPREME COURT OF THE UNITED STATES

BENEDICT DI GERLANDO *v.* THE STATE OF NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK, STATE OF NEW YORK

No. 66–615. Decided November 4, 1966

PER CURIAM

Petitioner DiGerlando has filed a petition for habeas corpus in the Federal District Court asserting that his conviction for burglary in the New York Courts is invalid because based upon evidence improperly before the trial court in violation of petitioner's right to counsel under the 14th Amendment. The writ was denied, 208 F. Supp. 864 (D.C.S.D.N.Y.), the Court of Appeals affirmed, 310 F.2d 271 (C.A. 2d Cir.), and we granted certiorari.

The fundamental question for our consideration is whether the admission into evidence of the officer's clandestine observations constituted 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 (1963).

On the night of January 19,1964, Albany City Police received information from a "reliable" informer that the next night (that of January 20, 1964) there was to be a burglary of a fur shop in the downtown area of the city. Petitioner, the informer related, had been planning the burglary with another (one Vandettio) for approximately three days.[1] Based upon this "reliable" information the intelligence squad of the Albany City Police

organized what was referred to in the evidence as a "stake-out." Eight officers were selected for this purpose; all carefully picked, all made familiar with the floor plan of the fur shop, the area immediately surrounding the fur shop and the "mug shots" of Petitioner and Vandettio. Two other officers set up an immediate "around-the-clock" surveillance of Petitioner's apartment, noting the ingress and egress of every questionable person. Vandettio was seen to enter and leave Petitioner's apartment building twice within an eight-hour period immediately preceding the burglary of the fur shop. Each time, Vandettio was carrying a large brown paper bag.[2]

At approximately 1:30 on the morning of January 21,1964, two surveillance officers saw a dark 1957 Chevrolet automobile stop in a parking lot a few blocks from the fur shop. Two figures were seen to leave the car and pass into an alley, which, the officers later testified, led to the rear door of the fur shop. The two officers followed the figures to the rear of the shop, watched as they apparently looked about for a watchman, and then saw them enter through a small window after noiselessly breaking the pane. By means of a portable pocket radio two more officers were summoned and took their places outside the front door to the fur shop. Officers Haynes and Schroeder stood their positions and watched as the two figures moved about in the fur shop.[3]

Officer Schroeder testified that after watching the figures move about for a very few minutes:

> One, the large one, came running out the back door and he had something that I could see was large and bulky on his back. He was holding it with both of his hands and he came running right toward me. I drew my gun, shined my flashlight on him and told him to stop.

> … He stopped and put his hands up and when he did that he dropped the coats and just stood there.[4]

And further:

> Oh, Yes, I recognized him all right. It was the defendant, Mr. DiGerlando, the man sitting right there. I identified myself and asked him who he was and what he was doing. All he would do was give me his name, Benedict DiGerlando. Well, when I picked up the fur coats I found the pipe wrapped with cloth. That was right to the left of Mr. DiGerlando.[5]

Petitioner's objection to all of Officer Schroeder's testimony was overruled by the trial court. Petitioner was convicted of burglary and he appealed the conviction. The Court of Appeals affirmed, holding that Officer Schroeder's clandestine observations did not infringe upon petitioner's constitutional right to the assistance of counsel.

At this late date it stands too well settled to admit of much reiteration that the Sixth and Fourteenth Amendments provide a formidable standard of basic fairness to all accused of crime. The right to advice and guidance of counsel is basic and all encompassing. It exists not only at the "earliest possible need" but by all concepts of due process at the "initial involvement." *Spano v. New York,* 360 U.S. 315, 326 (1959) (Douglas, J., concurring). Time and again this Court has been called upon to exercise a just restraint upon the ubiquitous and sometimes officious hand of law enforcement[6] and to see to it that an accused's right to counsel was implemented at all possible levels where his personal liberty was or may have been endangered. Such a right is not a mere pittance to be used as desired and dispensed with at will: Its terms are obligatory; its scope wide.

In *Massiah v. United States,* 323 U.S. 233, this Court observed that "a Constitution which guarantees a defendant the aid of counsel at trial could surely vouchsafe no less to an indicted defendant … in a completely extrajudicial proceeding. … Anything less … might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Id.* at 243, quoting Douglas, J., concurring in *Spano v. United States,* 360 U.S. 315, 326. It is at the earliest possible opportunity, when counsel's guidance has its greatest effect, that this right must be preserved, not at the latest possible time. *Crooker v. California,* 357 U.S. 433 (1958), recognized that time as the stage when "legal aid and advice are most critical to petitioner."[6]

Can there be room for speculation that when Benedict DiGerlando exited from that fur shop he had entered a stage "when legal aid and advice" are most critical? There was possibly no more critical a stage than that very moment when the full force and implementation of the law was about to take effect, when investigation ceased and accusation began, when Petitioner's liberty was arrested.

Petitioner, a layman, was undoubtedly unaware of police methods and surveillance. He had no reason to suspect that his privacy belonged to anyone other than himself at that very moment. The "guiding hand of counsel" was essential to advise petitioner of his rights in this delicate situation. *Powell v. Alabama,* 237 U.S. 45, 69 (1932). This was most assuredly "a critical stage." *Massiah v. United States,* 382 U.S. at 226. It was a stage surely as critical as the arraignment in *Hamilton v. Alabama,* 368 U.S. 52 (1961), and the preliminary hearing in *White v. Maryland,* 373 U.S. 59 (1963). What happened at this stage would certainly "affect the whole trial," *Hamilton v. Alabama, supra* at 54, because rights "may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Ibid.*

It would exalt form over substance to make the right to counsel, as the State of New York contends, depend upon whether at the time of the observation, the authorities had secured a complaint. Petitioner had, for all practical purposes, already been charged with burglary, for Officer Schroeder testified that under no circumstances would he not have effected an arrest of both subjects.[8]

The Solicitor General, in his brief and oral argument, suggests that this Court, by its holdings, never intended the "right to counsel" to protect the observed acts of a defendant unaided by counsel but that our recent holdings prohibit only the admission of defendant's statements uttered without benefit of counsel.[9] The Sixth and Fourteenth Amendments do not strike so hollow; their protection is real, not imaginary, not illusory or subtle. Neither logic nor reason dictates a meaningful difference between that spoken and that done; each is equally incriminating; each is subject to observation. This argument proposes a difference without meaning, which we decline to follow. If the rule we announce today is to have any efficacy at all, it must apply to indirect and surreptitious intrusions as well as to those accomplished in the public square. In this case, DiGerlando was more seriously imposed upon than either Massiah or Escobedo because he did not know that he was under observation by a government agent.

There is necessarily a direct relationship between the importance of a stage to the police in their quest for a conviction and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his Constitutional rights. As we said in *Escobedo, supra,* at 654:

> No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

And further:

Nothing we have said today affects the powers of the police to investigate an unsolved crime by gathering information from witnesses and by other proper investigative efforts. 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 circumstances like these, the accused must be afforded advice and guidance of his lawyer.

The judgment of the New York Court of Appeals is reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed and remanded. AZ AT

endnotes

1. The "informer" was never identified. Officer Graham testified that he had known the informer for a number of years, that he had spoken with him on many cases and that much of the information he supplied had led to arrests in the past.
2. The contents or significance of the "brown paper bag" were never made known.
3. There was considerable doubt as to whether either of these two officers could actually see any movement at all. Officer Schroeder testified that there was a stream of light "that appeared to be shining all the way through the shop from out in front of the shop."
4. The coats Officer Schroeder referred to were identified at trial by him and established by the owner as coming from the burglarized fur shop.
5. The State apparently contended that the pipe was the instrument used to break the pane of glass that led directly to the entry of the burglars.
6. *See, e.g., Weeks v. United States,* 232 U.S. 383 (1913); *Mallory v. United States,* 357 U.S. 261 (1957); *Elkins v. United States,* 361 U.S. 548 (1960); *Massiah v. United States,* 382 U.S. 176 (1964); *Escobedo v. Illinois,* 365 U.S. 902 (1964).
7. *See also Massiah v. United States,* 382 U.S. at 245.
8. See *People v. Davis,* 13 N. Y.2d 690, 191 N.E. 2d 674, 241 N.Y. L. 2d (1963); *People v. Rodriguez,* 11 N.Y.2d 279, 133 N.E. 2d 651, 229 N.Y.L.2d 353 (1962).
9. *See* Broeder, *Wong Sun v. United States, A Study in Faith and Hope,* 42 NEB. L. REV. 483. The rule sought by the State would provide a very hollow constitutional guarantee because for all practical purposes the conviction is already assured by pretrial examination. The Soviet Criminal Code does not permit a lawyer to be present during the investigation. The Soviet trial has thus been aptly described as an "appeal from the pretrial investigation". FEIFER, JUSTICE IN MOSCOW 86 (1964).