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**Top Decision**

# *High Court Weighs Right To Counsel*

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By John P. MacKenzie
Washington Post Staff Writer

When the Supreme Court agreed to review four cases involving the right of criminal suspects to legal counsel, it probably was making the most important decision of the young term.

By the mere timing of their grant of review Monday, the justices indicated that they will have more to say in 1966 in defining the rights of the accused and the powers of police—without waiting for Congress, the American Law Institute, President Johnson's Crime Commission or any group of scholars debating and studying the problem.

And by their choice of cases, the justices may have set the outer limits of their own review. Far-reaching as the review is bound to be, it seems destined to leave some problems for another day.

Development of the right to counsel has moved swiftly since the widely acclaimed 1963 Gideon decision that the Bill of Rights guarantee extended to state as well as Federal trials. The following May, the Court held that it was a denial of counsel for Federal agents, before trial, to eavesdrop on the conversation of a man under indictment and a co-defendant who was cooperating with the Government.

In June, 1964, a sharply divided Court moved back still further the time when the right to counsel becomes binding. Or did it? It ruled that Danny Escobedo, a murder suspect who already had a lawyer, was denied his constitutional right to counsel when police arrested him and refused to let him see the lawyer until they were through with him. Without warning Escobedo of his legal right to counsel or to remain silent the Chicago police obtained incriminating statements. By a 5-to-4 vote, the Court threw out the statements. But the Court apparently added a test for determining when counsel was required: at the point when police cease to make a general investigation of crime and begin to focus on a particular suspect.

The double-barreled feature of the Escobedo opinion caused judicial consternation. Some opinions are "creatively ambiguous," bringing new insights from lower courts to guide the Supreme Court when it re-examines them, but Escobedo did not seem to work out that way.

State and Federal court decisions ran in all directions and everybody appealed. By last week there were 70 to 80 cases on the Supreme Court's massive docket which raised,

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or purported to raise, questions left hanging by the Escobedo decision.

If, as a few observers have hinted privately, some justices are hoping to outrun Congress or the Law Institute to prevent curtailment of the newly expanded right to counsel, it is also true that the Court was responding to real pressures from lawyers and lower courts.

Among the four cases the Court selected, the prosecutors from three states joined with the convicted petitioners in urging review. A New York prosecutor said that the administration of criminal justice would be "aided, simplified and established on a firm foundation if this Court were to give a final answer to the question."

This view has not been shared by the Justice Department. There many lawyers feel that the courts should avoid formulating hard-and-fast rules of evidence in an area that is getting more study than ever before. All the evidence is not in, they say, and the Government opposed review of the fourth case, a Federal robbery case from California.

Besides the agreement of prosecutors, a probable factor in the choice of these cases is the quality of their pleadings. Out of a motley batch of petitions and briefs, these four undoubtedly offered some of the best hopes for intelligent argument on the issues. If this is so, then the quality of court-oppointed counsel is an ironic break in favor of prisoners who had no lawyers when they say they needed them most: when they were in police custody.

The Arizona, New York and California cases all raise the question whether the prisoner must request counsel or be deemed to have waived his constitutional right.

In the California case, the prisoner, Carl C. Westover, was advised of his right to counsel but he said nothing about getting one. Westover says the advice was meaningless since he was being held incommunicado for some 17 hours, and he contends that FBI agents had a duty to do more than merely advise him.

In the New Jersey case of Sylvester Johnson and Stanley Cassidy, condemned to death

for the 1958 holdup-slaying of a store owner in Camden, N.J. the New Jersey Supreme Court assumed for the sake of argument that the case fit the Escobedo pattern, but held that the doctrine was not retroactive.

Last June the Court, for the first time, ruled that a newly declared constitutional right—in that case the right to be free from unreasonable searches and seizures by state officers—could be limited by the Supreme Court to future application only. The Court suggested that the right to counsel was more fundamental to the fairness of the trial's guilt-finding process and might not be so limited.

So the New Jersey case calls on the justices to decide what sort of right is the right to counsel after arrest. Is it aimed chiefly at keeping police from invading other rights, a punishment for law officers like the rule excluding illegally seized evidence? Or is it closer to the fair-trial guarantee? Former Justice Arthur J. Goldberg, author of the Escobedo opinion, strongly stated that he felt the trial process began at police headquarters.

Although technically the Justice Department is required only to argue the Westover case, the Solicitor General may well offer a somewhat broader brief to help the Court decide the other cases. This is bound to produce some soul-searching within the Justice Department and perhaps the White House.

Attorney General Nicholas deB. Katzenbach is chairman of the President's Crime Commission, challenged by Mr. Johnson to come up with ideas by next year to reduce crime. The Commission's executive secretary, James Vorenberg, is chief draftsman for a proposed Law Institute code to govern arrest procedures. The more liberal Solicitor General, Thurgood Marshall, also is no rookie in the area of criminal law.