

MR. NEDRUD: Mr. Chief Justice, if it please the Court:

My name is Duane Nedrud. I am counsel for the *amicus* National District Attorney's Association. My co-counsel is Miss Oberto. I thought that her presence might show that prosecuting attorneys aren't all bad or she wouldn't be working for us on a full time basis.

If I may use some words of one of the Justices of this Supreme Court, "The *Escobedo* decision and the *Dorado* interpretation makes it more necessary than ever that we stop and look where we are going. If we are talking about equality between rich and the poor, we are striving for a worthy objective. If we are talking about equality between the policeman and the criminal, we are on dangerous ground."

I would remind this Court that we are not talking about the police versus the defendant. We are talking about the people versus the defendant. In the same way that we would not talk about the Army or the Marine Corps versus the Viet Cong, but we would talk about the United States versus the Viet Cong.

I have not mentioned in my brief anything about the Fifth or Sixth Amendment. I concede that this Court can interpret Amendments in the way that it sees fit. I am willing to agree with the ACLU in their brief, in one point where they quote me, although they do misquote me when they refer to *Malloy* and *Hayes* in substitution form, on pages 26 of their brief, instead of *Haley* and *Payne*, whom I consider entirely different; that an admonishment in the *Dorado* interpretation will not materially affect confessions.

If this is to be our objective—to limit the use of the confession in criminal cases—then you are taking from the police a most important piece of evidence in every case that they bring before a court of justice. Police officers are public servants. They are not attempting to put innocent people in jail. They want to follow the dictates of this Court, and they will follow them to the best of their ability, but they too are human beings. They do have, however, an experience and knowledge which many of us lack, because this is their job—the investigation of crime—and we have not, as lawyers, paid attention to their problems. We have seldom been down to the police station and asked, "What can we do to assist you in your problems?"

We are more inclined—and I talk about the prosecuting attorneys, and I am not referring to this Court any more than any other lawyer in the United States.

If I may use the present case of *Miranda* as an example, the defense admits that there is a voluntary confession. He says that we should not allow this confession because he did not have counsel present, because we would not have been able to convict him, because there was no other evidence except his own voluntary statement that his male organ had penetrated a half an inch. Otherwise, he would have been acquitted.

Is this what we are looking for, to acquit *Miranda* because he did not have counsel? The *amicus* here has presented data covering thousands of man-hours on the part of the members attempting to show the widespread use of confessions. I am not saying that the widespread use of confessions justifies their use. I am just attempting to present to you, through our members, the importance of the confession in our criminal administration of justice.

I believe that there is something beyond that which we are discussing here. I think that there is a need—and I have mentioned this, and I pray for it—that all public servants: law enforcement officers, prosecuting attorneys, trial courts, and Members of this Court, work

together. We are not adversaries. There is a need, I think, on the part of the people, to be able to refer to “my policeman,” “our police,” “my court,” and not “those cops.”

MR. JUSTICE FORTAS: Do you think we ought to overrule *Escobedo*?

MR. NEDRUD: Sir?

MR. JUSTICE FORTAS: Is it your position that we should overrule *Escobedo*?

MR. NEDRUD: If I knew what *Escobedo* meant, I may say so, but I have said in my brief, Mr. Justice Fortas, that I think that *Escobedo* should never have been appealed in the facts of the case. I think that this Court rightly reversed the case on the facts.

MR. JUSTICE FORTAS: Well, you’re not urging that we overrule *Escobedo*?

MR. NEDRUD: No, sir. It’s our system of justice, in effect, which we need as a matter of change. I do not attempt to say that defense counsel is wrong when they attempt to do the best they can for counsel. This is our system of justice.

But I could tell you, for example, in the State of New York, that when the defense counsel is picked by those who are in the profession of crime—if I can use this—that they wonder who is “hot,” for example, in winning cases now, and they are picked almost as if they were racehorses, because now they are winning. There is nothing so fickle as a criminal defendant. He wants only one thing. He wants to win. Now if a prosecuting attorney only wants to win, then we should not have that prosecuting attorney in office. We should make a change.

MR. CHIEF JUSTICE WARREN: May I ask you this, please, Mr. Nedrud? If you agree on the facts that *Escobedo* should have been reversed, what would you say as to the man who did not have a lawyer but who said he wanted a lawyer before he talked?

MR. NEDRUD: If he asked for a lawyer, and he does not waive his right to counsel, I think that he should have a lawyer. I think that even the state should—I would go so far as to say that I think the state should appoint him a lawyer, if he asks for a lawyer. I do not think, however, that we should in effect encourage him to have a lawyer.

MR. CHIEF JUSTICE WARREN: Why do you say we should not encourage him to have a lawyer? Are lawyers a menace?

MR. NEDRUD: Mr. Chief Justice, a lawyer must in our system of justice attempt to free the defendant. This is his job.

MR. CHIEF JUSTICE WARREN: Because it is his professional duty to raise any defenses the man has?

MR. NEDRUD: Yes, sir.

MR. CHIEF JUSTICE WARREN: Do you think, in doing that, is a menace to our administration of justice?

MR. NEDRUD: I think he is not a menace at the trial level. He is not a menace, per se, but he is, in doing his duty, going to prevent a confession from being obtained.

MR. CHIEF JUSTICE WARREN: When does he cease being a menace?

MR. NEDRUD: Mr. Chief Justice, I did not say he was a menace.

MR. CHIEF JUSTICE WARREN: You said he was if he interjected himself into it before the trial level.

MR. NEDRUD: I merely said he would prevent a confession from being obtained. And if this is what we are looking for, we should appoint a counsel even before the arrest stage, because the moment that a murder takes place the Government is out looking for the criminal.

MR. CHIEF JUSTICE WARREN: If a lawyer, as you say he is entitled to a lawyer under the facts of *Escobedo*, and the lawyer is entitled to tell him that he doesn't want him to talk to the police, why would it be a menace for another lawyer whom the defendant didn't want, to do the same thing?

MR. NEDRUD: Mr. Chief Justice, I am not disagreeing with you one iota. I am just saying that if, in effect, this is what should be done—if you want to equalize, for example, the defendant's right against the policeman—naturally he should have counsel if this is what we are striving for.

MR. CHIEF JUSTICE WARREN: Well, suppose we put it on the basis of not equalizing anything, or balancing anything, but on protecting the constitutional rights of the defendant not to be compelled to convict himself, on his own testimony.

MR. NEDRUD: Mr. Chief Justice, I of course do not interpret the Constitution. This is, of course, your prerogative, sir.

MR. CHIEF JUSTICE WARREN: How do you interpret it?

MR. NEDRUD: I do not interpret it that the defendant is entitled to a lawyer, until the trial stage.

MR. CHIEF JUSTICE WARREN: Until the trial starts?

MR. NEDRUD: Yes, sir.

MR. CHIEF JUSTICE WARREN: Where do you set that authority?

MR. NEDRUD: As I read the Constitution—you asked me my opinion, and I said I have no authority to interpret the Constitution—I am saying that this is the way I read the Constitution.

MR. CHIEF JUSTICE WARREN: Has that been the way the Court has read the Constitution in days gone by?

MR. NEDRUD: I believe so.

MR. JUSTICE DOUGLAS: Counsel, everybody knows that if he is appointed a lawyer at the beginning of trial, then the lawyer can't possibly represent him. He needs time to prepare for the trial, so the appointment must be at some point anterior to the trial. Our question here is at what point? How far anterior?

MR. NEDRUD: Mr. Justice Douglas, I am not concerned when the lawyer enters the stage, and maybe part of our problem is that the prosecuting attorney enters before he should.

MR. JUSTICE DOUGLAS: Under the procedures in some states, as you well know, very important rights can be lost many days, many weeks prior to the trial. We come down to the question, which begins with the Constitution, concededly—I think we'd say "concededly"—everyone is entitled to a lawyer at the trial, and also at some point anterior to the trial.

MR. NEDRUD: The question comes, I think, Mr. Justice Douglas, to whether or not we are going to allow the trial court to determine the guilt or the innocence, or the defense counsel. If the defense counsel comes in at the arrest stage, he will, as he should, prevent the defendant from confessing to his crime, and you will have fewer convictions. If this is what is wanted, this is what will occur.

MR. JUSTICE BLACK: I guess there is no doubt, is there, that the provision that provides for protection against compelling him to give testimony has a consequence of fewer convictions?

MR. NEDRUD: Mr. Justice Black, this is true. Moreover, again we are talking about the voluntary-involuntary rule, and I have not questioned this whatsoever. This is, I believe, a good rule. I have said that *Mapp* versus *Ohio* is a good rule. I believe, however, that there is a point of diminishing returns and at some stage the police must be in a position to protect us.

MR. JUSTICE BLACK: At some stage, according to our opinion, he is entitled to a lawyer—at some stage. And we have said, as I recall, that it's at the stage when he needs it. At least after he has been detailed. What about the point where a man is seized by Government agents and, as you say, they are "our agents," they are "our officers." There is no antagonism. But what about the fact that when they're seized by someone who has the power to detain him, keep him away from his friends and his relatives and in seclusion if it's desired? Can you think of any time when he needs a lawyer more than at that point—at the point of detention?

MR. NEDRUD: Mr. Justice Black, again the question is are we interested in convicting the defendant? Or are we interested in protecting, or acquitting him? This is the only point that I can, in effect, make if you say that this defendant needs counsel at this time.

For example, if I may use this illustration: I worked when I was a professor of law—which I was, prior to taking this position—I worked on the defense project for the American Bar Association. In the questionnaire, there was a statement: "When is the ideal time for counsel to be appointed for the defendant?" The question is, when is the ideal time "for whom"? The people? Or the Defendant? Now if it is for the defendant, then it is the earliest possible opportunity. If it is for the people, it should not be until a critical stage. If it is *White v. Maryland*, I agree it should be at the preliminary hearing stage. If it is the question of arraignment, as in *Alabama*, I agree. If it is at the trial stage, and he has lost none of his rights which can be interpreted in one way or another, then I say that it should be at the trial stage.

MR. JUSTICE BLACK: Well, as a prosecutor, I have found out over many years that it's a very critical stage when a person is taken to the police headquarters. There is nothing wrong with it. That is part of our government. A person is taken to police headquarters under arrest, under detention. He can't leave if he wants to, unless they let him. Would you call that "voluntary" for him then—for them to have him there, in that situation, and probe him about his probable conviction of crime? Would you think of that as voluntary?

MR. NEDRUD: Being voluntarily in the police station? No.

MR. JUSTICE HARLAN: I suppose you would say, wouldn't you, it's a question of fact for somebody to decide, in the context of different circumstances that have arisen?

MR. NEDRUD: I would hope, Mr. Justice Harlan, that Court has "protected," as I referred to it in my brief, by an involuntary rule of the totality of circumstances, and I hope that the Court would also continue to invoke this rule, but not go so far as to prevent the police from protecting us.