To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

SUPREME COURT OF THE UNITED STATES

From: Clark, J.

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

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Recirculated:

Ernesto A. Miranda, Petitioner, 759 v. State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 v. State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
Carl Calvin Westover, Petitioner, 761 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 v. Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE CLARK, dissenting in Nos. 759, 760, and 761, and concurring in result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I find myself unable to join the majority because its opinion goes too far ~~or too little~~ TOO FAST while my dissenting brethren do not go quite far enough. Nor can I join in the Court's criticism of the present practices of the police and investigatory agencies as to custodial interrogation. The materials referred to as "police manuals" [1] are not shown by the record here to be

[1] *E. g.*, Inbau and Reid, Criminal Interrogation and Confessions (1962); O'Hara, Fundamentals of Criminal Interrogation (1959); Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951).

the official manuals of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court are the rare exceptions to the thousands of cases that appear in the law reports every year. I am proud of our police agencies—all the way from municipal and state forces to the federal bureaus.

I.

The *ipsi dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." *Ante*, p. —. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. *Escobedo* v. *Illinois*, 378 U. S. 478, 490–491 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without first advising, in addition to the traditional warnings, the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, that counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new proceedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.[2] Since there is at

[2] The Court points to England, Scotland and India as having equally protective rules. As my Brother HARLAN points out in his dissent, *post*, pp. 19–20, the Court is mistaken in this regard for it

this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements, truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

II.

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforcement." *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that "the Constitution has prescribed" its holding and where the light of our past cases, from *Hopt* v. *Utah*, 110 U. S. 574, (1884), down to *Hayes* v. *Washington*, 373 U. S. 503

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overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter to be so strict as those imposed today in at least two respects: (1) The offer of counsel is put in the phrase that suspects have "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover* v. *United States*, 342 F. 2d 684, 685 (1965) ("right to consult counsel"); *Jackson* v. *United States*, 337 F. 2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that wherever the accused "decides that he wishes to consult counsel before making a statement, the interview is terminated at that point . . . . When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that counsel is not necessarily present at the interview. (2) The same practice is followed as to indigents, except in addition the agent advises, "those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge." This might well be interpreted by the type of suspect which the Court continually mentions as meaning that he could get counsel when brought before the judge or at trial—but not at custodial interrogation.

(1963), are to the contrary. Indeed, even in *Escobedo* the Court never hinted that an affirmative "waiver" was a prerequisite to questioning; that the burden of proof as to waiver was on the prosecution; that the presence of counsel—absent a waiver—during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are "confessions." To require all those things at one gulp should cause the Court to choke over more cases than *Crooker* v. *California*, 357 U. S. 433 (1958), *Cicenia* v. *Lagay*, 357 U. S. 504 (1958), which it expressly overrules today.

The rule prior to today—as Mr. Justice Goldberg, the author of the Court's opinion in *Escobedo*, stated it in *Haynes* v. *Washington*—depended upon "a totality of the circumstances evidencing an involuntary . . . admission of guilt." 373 U. S. 503, 514. And he concluded:

> "Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducement on the mind and will of an accused . . . . We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded." *Id.*, at 515.

II.

I would continue to follow that rule. In the "totality of the circumstances" rule of which my Brother Goldberg spoke in *Haynes* in 1963, I would take into consideration whether, in a given case, the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, if he was too poor to employ counsel that the court of competent jurisdiction would appoint one at his request. In the event these warnings were not given, the burden would be on the State to prove that counsel was waived or that on the totality of the circumstances, including the failure to give the warnings, the confession was voluntary.

Rather than employing the arbitrary rule which the Court lays down I would follow the traditional, more pliable one that we are accustomed to administer and which we know from our cases is an effective instrument in the administration of the Due Process Clause of the Fourteenth Amendment. In this way we would not be acting in the dark nor in one full sweep changing the traditional rule of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in the balancing of individual rights against the rights of society. It will be soon enough to go further when we are able to appraise with somewhat better accuracy the effect of such a holding.

I would affirm the convictions in *Miranda* v. *Arizona*, No. 759; *Vignera* v. *New York*, No. 760; and *Westover* v. *United States*, No. 761. In each of those cases I find from the circumstances no warrant for reversal. In *California* v. *Stewart*, No. 584, I would dismiss the writ of certiorari for want of a final judgment, 28 U. S. C. § 1257 (3) (1964), but if the merits are to be reached

I would affirm on the ground that the State failed to fulfill its burden, in the absence of a showing that appropriate warnings were given, of proving a waiver or a totality of circumstances from which voluntariness is fairly shown. I would leave the State free on retrial to prove, if it can, these elements.