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Constitutional Law - Right to Court Appointed Counsel for Indgient Defendants in Noncapital Cases - Applied to State Proceedings through the Fourteenth Amendment

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Because of the widespread confusion arising from the earlier cases,[46] a method was necessary whereby the vacillations and contradictions could be put to an end. It would seem that the intent and objective test is such a method. As seen, the test is capable of holding its own against any legitimate criticism. The test has been readily applicable in the cases that have arisen thus far, although no case has been reported which has been capable of testing its utmost flexibility. Some imaginative and complex courses of criminal conduct have been suggested in dissenting opinions which, it is maintained, will show the fallibility of the test.[47] Nevertheless, until such a magical criminal combination of events is transformed into the facts of a genuine case, the test is capable of meeting all conventional fact situations. In truth, can any test be asked to do more? When that exceptional case does arise which contains an extended range of offenses, all committed under the guise of one intent and objective, the intent and objective test will have to be carefully revisited. It will then be learned whether the accused's stated singular intent will reign over a more restrictive interpretation of the test that would place practical limits upon the bounds of criminal conduct. When the court's conscience becomes shocked with the multiplicity of crimes involved, legal logicality would demand that the test be deemed inapplicable and a standard of punishment to match the defendant's criminal liability be substituted.

James W. Cardwell

Constitutional Law — Right to Court Appointed Counsel for Indigent Defendants in Noncapital Cases — Applied to State Proceedings Through the Fourteenth Amendment

Petitioner was convicted in a Florida state court of breaking and entering with intent to commit a misdemeanor, which under Florida law is a felony.[1] The judge, acting in accordance with Florida law,[2] refused the indigent petitioner's request for counsel. At the trial Petitioner claimed that the court's refusal to appoint counsel was a

[46] See text accompanying notes 12-17 *supra.*

[47] People v. McFarland, 58 Cal. 2d 748, 376 P.2d 449, 466 (1962); Seiterle v. Superior Court, 57 Cal. 2d 397, 369 P.2d 697, 700-01 (1962); Neal v. State, 55 Cal. 2d 11, 357 P.2d 839, 847-48 (1960).

[1] Fla. Stat. Ann. § 810.05 (1961).

[2] Fla. Stat. Ann. § 909.21 (1961) states: "In all *capital* cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary . . . ." (Emphasis added.) See also Watson v. State, 142 Fla. 218, 194 So. 640 (1940).

violation of his rights under the United States Constitution, but proceeded to present his own defense. Petitioner was convicted and sentenced to five years in the penitentiary. He filed a petition for habeas corpus in the Florida Supreme Court in which he claimed a constitutional right to court appointed counsel. The petition was denied without opinion.[3] Certiorari was granted by the United States Supreme Court. The Supreme Court then appointed counsel and instructed both petitioner and respondent to discuss the following question: "Should this Court's holding in Betts v. Brady, 316 U.S. 455 be reconsidered?"[4] *Held, reversed and remanded:* The sixth amendment to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel in his defense, is fundamental and essential to a fair trial and is made obligatory on the states by the due process clause of the fourteenth amendment.[5] *Gideon v. Wainwright,* 372 U.S. 335 (1963).

The problem whether a defendant in a criminal action has a right to legal counsel is one that has been at issue in the common law for centuries.[6] The sixth amendment to the United States Constitution clearly states that such a right exists in the United States.[7] Initially, there was disagreement among lawyers and judges as to whether the "right to counsel" merely insured the defendant's right to retain counsel in criminal cases if he so desired or whether the "right" was to demand that counsel be appointed by the court if the defendant could not afford to retain counsel.[8] In *Johnson v. Zerbst*[9] the Supreme Court settled the dispute by holding that in federal court, where the sixth amendment is applicable, the indigent defendant has a right to demand that the court appoint counsel for him and that a refusal of his demand would result in the conviction being void. This rule was later interpreted to mean that counsel had to be provided at all stages of the trial[10] and that it was not limited to cases involving serious offenses.[11]

[3] Gideon v. Cochran, 135 So. 2d 746 (Fla. 1961).

[4] Gideon v. Cochran, 370 U.S. 908 (1962).

[5] Mr. Justice Harlan, concurring, expressly limits the right to counsel to cases involving the possibility of a substantial prison sentence. He specifically stated that the question of whether the rule in the instant case should extend to *all* criminal cases need not now be decided. 372 U.S. at 351. The majority opinion does not indicate such a limitation.

[6] IV Blackstone, Commentaries 354-55 (1807).

[7] U.S. Const. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[8] Bute v. Illinois, 333 U.S. 640, 660-63 (1948); Betts v. Brady, 316 U.S. 455, 464-69 (1942).

[9] 304 U.S. 458 (1938).

[10] Edwards v. United States, 139 F.2d 365 (D.C. Cir.), *cert. denied,* 321 U.S. 769 (1944).

[11] Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

Gideon v. Wainwright concerns a defendant's rights in state courts. The Bill of Rights is not applicable to state court procedures.[12] Therefore, when attacking a state statute as being violative of federal constitutional rights, the petitioner usually bases his claim on the due process or equal protection clause of the fourteenth amendment.

The fourteenth amendment puts no restrictions on the state court's procedure unless the procedure is discriminatory or an invasion of a "fundamental" right.[13] Thus, the Court must decide, in a given situation, whether a certain right is fundamental and, consequently, cannot be denied the defendant by the states, or whether it is not essential and fundamental to a fair trial and, therefore, should be left to the discretion of the states. It has been contended that all of the rights guaranteed by the Bill of Rights are "fundamental," and thus the first eight amendments should be incorporated into the fourteenth.[14] This view has not prevailed, but on various occasions the Court has considered the right involved in a particular case "fundamental" and thus protected by the due process clause of the fourteenth amendment. By this case-by-case method various rights contained in the Bill of Rights have been included in the rights protected by the fourteenth amendment.[15] The principal case is an example of such a decision.

In the 1932 case of *Powell v. Alabama* the Supreme Court first applied the due process clause of the fourteenth amendment to the question of the right to counsel in state criminal proceedings.[16] The Court, stated:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances

[12] Gallegos v. Nebraska, 342 U.S. 55 (1951).

[13] Adamson v. California, 332 U.S. 46 (1947); Brown v. Mississippi, 297 U.S. 278 (1936).

[14] Gideon v. Wainwright, 372 U.S. 335 (1963). "Since the adoption of that Amendment [fourteen], ten Justices have felt that it protects from infringment by the States the privileges, protections, and safeguards granted by the Bill of Rights. . . . Unfortunately it has never commander a Court." *Id. at* CDE. See also Adamson v. California, 332 U.S. 46, 71-72 (1946).

[15] The Supreme Court has declared unconstitutional the criminal procedure in state courts in the following cases: Mapp v. Ohio, 367 U.S. 643 (1961) (admissibility of illegally obtained evidence); Griffin v. Illinois, 351 U.S. 12 (1956) (refusal to provide indigent defendants with free transcripts of the trial); Brown v. Mississippi, 297 U.S. 278 (1936) (coerced confessions); Mooney v. Holohan, 294 U.S. 103 (1935) (perjured testimony); Frank v. Mangum, 237 U.S. 309 (1915) (mob domination of the jury).

[16] 287 U.S. 45 (1932).

as to preclude the giving of effective aid in the preparation and trial of the case.[17]

In 1942 in *Betts v. Brady*[18] the Court made it clear that in noncapital, as well as capital, cases due process would require a state court to appoint counsel under circumstances in which the defendant was incapable of adequately defending himself. The Court stated that the right to counsel in state courts was not a "fundamental" right *unless* the defendant for some reason could not prepare and present his own defense. In *Betts* the defendant was charged with robbery. The Court labeled him of "ordinary intelligence" because he had pleaded guilty and been sentenced in a previous criminal case without aid of counsel and, therefore, was "not wholly unfamiliar with court procedure." Under these conditions the Court upheld his conviction on the ground that he was not prejudiced by the absence of counsel. This standard for determining the necessity of defense counsel in noncapital cases was widely accepted by the states.[19]

Later, the Court reconsidered what was to be termed fundamental in capital cases and decided that the fourteenth amendment required the state court to appoint counsel for all indigent defendants, regardless of their ability to defend themselves.[20] This extension left the *Betts* decision intact because the rule was extended only to capital offenses. However, these cases led the way for the *Gideon v. Wainright* decision since from the decisions in these cases the decision in the principal case is but one more logical step in a previously indicated direction. The Court has in the past refused to distinguish between capital and noncapital offenses in cases involving constitutional rights in criminal procedure.[21] In *Gideon* a unanimous Court declared that the right of the defendant to counsel in *any* criminal action is a "fundamental" right and that the violation of this right by a state court is contrary to the due process clause of the fourteenth amendment. *Gideon* seems to place the federal court standards of *Johnson v. Zerbst*[22] upon the state courts.[23] These standards would

[17] *Id.* at 71.

[18] 316 U.S. 455 (1942).

[19] See, *e.g.*, Cook v. State, 32 Al. App. 168, 22 So. 2d 924 (1945); Allen v. Commonwealth, 324 Mass. 558, 87 N.E.2d 192 (1949); People v. Haddad, 306 Mich. 556, 11 N.W.2d 240 (1943); Stanfield v. State, 152 Tex. Crim. 324, 212 S.W.2d 516 (1948).

[20] In Hamilton v. Alabama, 368 U.S. 52 (1961), the Court stated: "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." See also Uveges v. Pennsylvania, 335 U.S. 437 (1948); Bute v. Illinois, 333 U.S. 640 (1948).

[21] Kinsella v. Singleton, 361 U.S. 234 (1960); Herman v. Claudy, 350 U.S. 116 (1956).

[22] 304 U.S. 458 (1938). This case provided for right to counsel in all federal criminal cases.

[23] 372 U.S. 335 (1963).

> We have construed this [the sixth amendment] to mean that in federal

require the appointment of competent counsel[24] in all criminal cases[25] in which the defendant is, in fact, indigent.[26] Moreover, if federal standards apply, counsel must be appointed as soon as the defendant is indicted, and there must be an attorney representing the defendant at every stage of the trial[27] and appeal.[28] However, a decision rendered against a defendant with no counsel would be valid if the defendant had expressly waived the right to counsel, but the trial court would have an obligation to inform the accused of his right to counsel and if the accused waived his right, to see the waiver was competently made.[29]

One important question was not answered by the Court: Will the doctrine of *Gideon v. Wainwright* be applied only prospectively or will the Court declare this rule to be retroactive in its application? If the Court applies the rule only prospectively, convictions rendered under the *Betts* rule will be unaffected. On the other hand a retroactive application of this decision would allow defendants who were convicted without aid of counsel under the old *Betts* rule and before to contest their convictions by writ of habeas corpus in federal court.[30] The defendants could claim that at the time of their conviction their constitutional right to counsel was denied them by an incorrect interpretation of the Constitution of the United States.

If the Supreme Court were to apply the doctrine of *Gideon* retroactively, it would not be without precedent in so doing. In *Eskridge v. Washington State Prison Board*[31] the Court applied their decision

> courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. . . . We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. *Id.* at 339-41.

[24] Willis v. Hunter, 166 F.2d 721 (10th Cir.), *cert. denied*, 344 U.S. 848 (1948). The states have differing opinions as to what constitutes competent counsel. See Annot., 74 A.L.R.2d 1390; see also *Ex parte* Lovelady, 152 Tex. Crim. 93, 207 S.W.2d 396, *cert. denied*, 333 U.S. 879 (1948); Andrews v. Robertson, 145 F.2d 101 (5th Cir.), *cert. denied*, 324 U.S. 874 (1945).

[25] Bute v. Illinois, 333 U.S. 640, 660-63 (1948); Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

[26] United States v. Sampson, 161 F. Supp. 216 (D.D.C. 1958).

[27] Latham v. Crouse, 320 F.2d 120 (10th Cir. 1963); Kraft v. United States, 238 F.2d 794 (8th Cir. 1956); Martin v. United States, 182 F.2d 225 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950).

[28] Douglas v. California, 372 U.S. 353 (1963); Johnson v. United States, 352 U.S. 565 (1957).

[29] No defendant will be forced to accept counsel, but the Court will reverse a conviction if it believes that the defendant's waiver was due to youth, ignorance, or insanity. See Moore v. Michigan, 355 U.S. 155 (1957); Wade v. Mayo, 334 U.S. 672 (1948); Marino v. Ragan, 332 U.S. 561 (1947).

[30] Fay v. Noia, 372 U.S. 391 (1963).

[31] 357 U.S. 214 (1958).

in *Griffin v. Illinois*[32] to reverse a conviction over twenty years old.[33] The Court's decision in *Johnson v. Zerbst*,[34] which provided for counsel in all federal criminal cases, has also been applied retroactively by lower courts.[35] The problem of retroactive application is also of major importance in connection with the Court's decision in *Mapp v. Ohio*,[36] which dealt with convictions obtained in state courts by using illegally obtained evidence. To date, the Supreme Court has not applied the *Mapp* rule retroactively, and there is a difference of opinion among the lower court judges as to whether the Court will do so in the future.[37]

If the *Gideon* case is applied retroactively, it will cause a great amount of litigation in the criminal courts of many states. In *Gideon* the state contended that if such a rule should be applied retroactively, some 5093 prisoners in Florida might be eligible to contest their convictions.[38] The adverse effect that such circumstances would have upon the administration of justice is patent. However, the weight given these adverse circumstances cannot begin to balance the injustice done to indigent defendants who are now in prison because of their inability adequately to defend themselves. In the principal case Mr. Justice Black, writing for the majority, stated:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. . . . Betts was an anachronism when handed down . . . .[39]

Considering the implication of this reasoning and the action taken by the Court to date, it seems highly probable that the *Gideon* rule is to be applied retroactively. Both state and lower federal courts have

[32] 351 U.S. 12 (1956). This case made it mandatory for the states to provide trial transcripts free of charge to all indigent defendants who need them for appeal. The Court based its decision upon the equal protection clause of the fourteenth amendment.

[33] This retroactive application was protested by Mr. Justice Harlan and Mr. Justice Whittaker and was done despite a plea by Mr. Justice Frankfurter in *Griffin v. Illinois* to apply the rule declared there only prospectively. See also a discussion of the problem by Mr. Justice Cardozo in Great Northern Ry. v. Sunburst Oil Co., 287 U.S. 358, 364-65 (1932).

[34] 304 U.S. 458 (1938).

[35] Robinson v. Johnston, 50 F. Supp. 774 (N.D. Calif. 1943).

[36] 367 U.S. 643 (1961). See also Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. Pa. L. Rev. 650 (1962).

[37] United States v. Walker, 323 F.2d 11 (5th Cir. 1963); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963); People v. Muller, 11 N.Y.2d 154, 182 N.E.2d 99 (1962). *But see* Hall v. Warden, Maryland Penitentiary, 313 F.2d 483 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963).

[38] Brief for Respondent, p. 56, Gideon v. Wainwright, 372 U.S. 335 (1963).

[39] 372 U.S. at 344-45.

handed down decisions applying the rule. In these cases, as in the cases involving the *Mapp* rule,[40] the courts have divided as to whether the rule should apply to previous convictions.[41] The Supreme Court, on the other hand, has shown clearly its attitude by treating cases involving previous convictions in the same manner as the direct appeals by reversing them "in light of this Court's decision in *Gideon v. Wainwright*."[42] The decision in the principal case creates an even greater susceptibility to post-conviction collateral attack than the decision in the *Mapp* case because in right-to-counsel cases waiver of the right will not be presumed by silence in the record,[43] whereas in cases involving the exclusion of unlawfully obtained evidence, some indication of an unreasonable search and seizure must be present in the record.[44] If these precedents and this reasoning are followed, it seems highly probable that 5093 prisoners in Florida and thousands more in other states[45] could have an opportunity for another day in court.

Whether or not the *Gideon* case is applied retroactively, the decision will certainly have far-reaching effects on the action of state

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[40] See note 37 *supra* and accompanying text.

[41] United States v. Fay, 219 F. Supp. 262 (S.D.N.Y. 1963); Commonwealth v. Banmiller, 410 Pa. 584, 189 A.2d 875 (1963). The Texas Court of Criminal Appeals has applied the *Gideon* decision retroactively and has granted new trials in *Ex parte* Hope, ___Tex. Crim.___, 374 S.W.2d 441 (1964) and *Ex parte* Parsons, ___Tex. Crim.___, 374 S.W.2d 442 (1964).

[42] See, *e.g.*, Davis v. Banmiller, 374 U.S. 489 (1963); Walker v. Walker, 374 U.S. 488 (1963). The Court has not yet expressly stated that it will apply the doctrine of *Gideon* retroactively in all cases in the future. In Picklesimer v. Wainwright, 375 U.S. 2 (1963), after the majority had reversed a pre-*Gideon* conviction in a memorandum opinion, Mr. Justice Harlan stated:

> I am unable to agree with the Court's summary disposition of these 10 Florida cases, and believe that the federal question which they present in common is deserving of full-dress consideration. . . . [I]t seems to me that the question whether the States are constitutionally required to apply the new rule retrospectively, which may well require the reopening of cases long since adjudicated in accordance with then applicable decisions of this Court, is one that should be decided only after informed and deliberate consideration. . . . In the current swift pace of constitutional change, the time has come for this Court to deal definitely with this important and far-reaching subject.

[43] Powell v. Alabama, 287 U.S. 45, 71 (1932); Smith v. United States, 216 F.2d 724 (5th Cir. 1954).

[44] Bender, *supra* note 36, at 657. Also, United States v. Walker, 323 F.2d 11 (5th Cir. 1963), held that *Mapp v. Ohio* would not be applied retroactively because the objective of the decision in that case was the prospective deterrance of officers in contrast with the object of *Griffin v. Illinois* which was fairness of procedure. This reasoning leaves open the door of that court for a retroactive application of *Gideon*.

[45] The respondent contended that the decision in the principal case would overrule decisions to the contrary in Alabama, Colorado, Florida, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wisconsin. Brief for Respondent, p. 71, Gideon v. Wainwright, 372 U.S. 335 (1963).