1964

Constitutional Law--Due Process of the Fourteenth Amendment--Right to Counsel in Non-Capital State Felony Prosecutions

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Recommended Citation

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In the principal case, the dissenting opinion, favoring the retention of the M'Naughten plus irresistible impulse test, said: "Rules of law of long standing should not be cast aside lightly but only upon a sound and meritorious basis. Such rules are not flapjacks and should not be tossed about as such." This decision came less than thirty days after the court upheld the test which it had followed for sixty-two years.

Joseph Weintraub, Chief Justice of the New Jersey Supreme Court, said in a recent article that as a practicing attorney, he fought for the removal of the M'Naughten test and then as a judge, he realized that the struggle between M'Naughten and its competitors is over an irrelevancy and refused to overturn the older rule.

This is not to say that M'Naughten and irresistible impulse are the perfect solution. Given the fact that a defendant commits a crime, he is at least slightly abnormal. The primary purpose in this field then, is to insure against repetition of criminal acts for the protection of society. Obviously, some rule should be formulated which will aid both legal and medical experts in their determination of criminal responsibility. But until some better means to reach the desired end are found, a rule which has proved durable and practical for many years should not be rejected.

John Dixon, Jr.

CONSTITUTIONAL LAW—DUE PROCESS OF THE FOURTEENTH AMENDMENT—RIGHT TO COUNSEL IN NON-CAPITAL STATE FELONY PROSECUTIONS.—The petitioner, Gideon, convicted of a non-capital felony offense in a Florida state court after entering a plea of not guilty, filed a habeas corpus petition in the Florida Supreme Court. His petition alleged that the trial court's denial of his request for court appointed counsel abridged his constitutional rights as he was without funds with which to retain counsel. The Florida Supreme Court, without opinion, denied him relief. The United States Supreme Court granted certiorari with leave to proceed in forma pauperis. Held: Reversed. A

26 Newsome v. Commonwealth, 366 S.W.2d 174 (Ky. 1962).
29 The article is based on this premise—Goldstein and Katz, Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity, 70 Yale L.J. 225 (1960-61).

1 Gideon v. Cochran, 135 So. 2d 748 (Fla. 1961).
2 Gideon v. Cochran, 370 U.S. 908 (1962). The Court appointed counsel to represent Gideon on appeal and requested that the briefs discuss the question: "Should this Court's holding in Betts v. Brady, 316 U.S. 455... be reconsidered?"
defendant in a non-capital state felony prosecution who enters a plea of not guilty and requests the court to appoint counsel to defend him because he is indigent has a right to have counsel appointed. The right to appointed counsel exists even where there are no special circumstances involved in the case which would lead to the conclusion that the accused would be denied a fair trial because of the absence of counsel. The right to counsel is so fundamental that it is a right which is essential to a fair trial, and the guarantee of the sixth amendment is made obligatory on the states through the fourteenth amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Court, in the principal case, expressly overruled the holding in the case of *Betts v. Brady*. The *Betts* case held that the sixth amendment right to counsel is not such a fundamental right so as to be essential to a fair trial. Thus, the *Betts* interpretation of the fourteenth amendment does not make the sixth amendment provision obligatory upon the states in non-capital cases absent a showing that the lack of counsel resulted in an unfair trial for the accused.

Basing its conclusion on dictum in *Powell v. Alabama*, to the effect that the right to counsel in any criminal proceeding is a fundamental right, the Court said:

... reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him... That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications... that lawyers in criminal courts, are necessities, not luxuries.

The decision in the principal case is one which a vigorous minority of the Court has long urged. It is a decision which, in the opinion of this commentator, will have a profound effect upon raising the quality of justice in state criminal prosecutions. Prior to the *Gideon*
case, it had been established that there is a requirement of assigned
counsel for indigent defendants in state criminal proceedings involving
a capital offense. The right to counsel assigned by the court in non-
capital state felony proceedings where the assistance of counsel is
deemed essential to a fair trial is not waived by the defendant’s enter-
ing a plea of guilty. One case held that where a plea of guilty was
entered and the right to court appointed counsel was specifically
waived by the defendant through fear, the waiver did not relieve the
court of the duty to appoint counsel since the presence of counsel to
assist in the defense was essential to a fair trial. From these cases,
it may be seen that the Court ventured to the edge of the special
circumstances rule in non-capital cases many times. At long last, in
Gideon the Court crossed the line.

The underlying principle involved in the instant case and in its
predecessors is simply that the states have failed to integrate the
practical economic problem of the indigent defendant with our con-
ception that justice in criminal proceedings is best achieved through
the adversary system. The contest between the highly trained
prosecutor and the layman who has no training in the operational
and theoretical niceties of the law is no contest. In such cases, con-
victions are not obtained because of the strength of the prosecution’s
case, but because of the weakness of the defense. The problem is not
new. The Court, as we have seen, has struggled with it for a long time.
Most of the states, including Kentucky, have made notable strides
toward its solution. Those which have hesitated, such as Florida, have
found that the hesitation was costly.

Indeed, the action taken by the Court in the principal case had
been predicted by at least one writer as far back as 1950:

10 Uveges v. Pennsylvania, 335 U.S. 437 (1948); Rice v. Olson, 324 U.S.
786 (1945).
12 Thirty-five states appoint counsel on request in any felony case. Fifteen
either make no provision, limit appointment to capital cases, or leave it to the
trial judge’s discretion. McNeal v. Culver, 365 U.S. 109, 119-22 (1961) (Dou-
glass, J., concurring opinion—Appendix).
13 Gholson v. Commonwealth, 308 Ky. 82, 212 S.W.2d 537 (1948), holding
that a defendant in a non-capital felony case who pleads guilty but neither requests
counsel nor waives his right to counsel in an intelligent, competent, understanding,
and voluntary manner has a right to counsel under Ky. Const. § 11 and the due
process clause of U.S.C. Const. Amend. 14. This case is noted in 88 Ky. L.J. 317
(1950).
14 Of the 8,000 prisoners in Florida penal institutions, 4,542 were convicted
without benefit of counsel. Already more than 3,000 have petitioned for
review of their convictions. Court calendars are jammed; distraught
prosecutors are working overtime searching petitioner’s records and
drawing up answering briefs; county budget directors are hunting desper-
It would seem highly desirable that the states themselves take the initiative in overhauling their criminal procedure instead of leaving the fundamental rights of their citizens in such condition that they must depend for enforcement upon further invasion by the Supreme Court of that domain traditionally belonging to the sovereign states alone.\textsuperscript{15}

Again, in 1959, it was said: "If local prosecutors and law enforcement agencies would carry the banner of reform, a point for state sovereignty in the field would be cogently made."\textsuperscript{16}

The impact of the 	extit{Gideon} decision will be felt by the bar. It will require more lawyers to devote more of their time to representing indigent defendants. It is with the practicing lawyer that the ultimate responsibility of solving the problem of the indigent defendant rests. An exception to this is found in those localities which have adopted some organized method of legal aid, such as the public defender system. Whether the bar responds effectively to the Supreme Court's call to seek to satisfy the ends of justice will, in large measure, determine whether the Supreme Court will find it necessary to intercede more stringently and enumerate the means whereby those ends are to be achieved.

The fact is simple. Until the present, the state, the bench, and the bar have failed to extend the cloak of justice to a large segment of our population. Whether this failure will be corrected in the near future depends upon the extent to which the individual practicing lawyer will willingly undertake his share of the remedial responsibility. This in turn, depends upon whether the cry of humanity for effective representation before our courts of justice will ring as loud in the lawyer's ears as the rustle of currency. The test has come. It is up to the legal profession to decide to what extent it believes in the adversary system of justice which it propounds. Only the advocate can make the abstract propositions of law by which our society and our nation are governed workable in the ordinary events of men.

The problem of the indigent defendant is not limited to non-capital felony cases. It permeates that large segment of humanity involved in the ordinary vagrancy cases.\textsuperscript{17} It extends to administrative proceedings, juvenile proceedings, and the police court. The step taken by the Supreme Court is a gigantic one. It is incumbent upon the individual lawyer and the local bar to see that it becomes an effective one. Indeed, the scales of justice have just begun to balance.

\textit{Marvin Lee Henderson}

\textsuperscript{15} Note, 38 Ky. L.J. 317, 325 (1950).
\textsuperscript{16} Batt, \textit{Equal Justice for All—Myth or Motto?}, 1 Wm. & Mary L. Rev. 325, 373 (1959).
\textsuperscript{17} See Thompson v. City of Louisville, 362 U.S. 199 (1960).