St. John's Law Review

Volume 37
Number 2 *Volume 37, May 1963, Number 2*

Article 7

May 2013

Constitutional Law--Sixth Amendment and Due Process--Appointment of Counsel Required for Indigent Defendant in All Criminal Cases (Gideon v. Wainwright, 31 U.S.L. Week 4291 (March 18, 1963))

St. John's Law Review

What *Pearson* does, in effect, is split the Massachusetts statute. It applies the first part of that statute which gives rise to the liability, but disregards the second part which limits the amount of that liability. It could be argued that the splitting of the Massachusetts statute in the present case did not prejudice the defendant because in either jurisdiction it would have been liable for damages.[37] It would seem that this argument could not be made if, for example, the Massachusetts statute, instead of limiting the liability of carriers, had made them immune from suit. The question would then arise whether a court, following the *Pearson rationale,* could constitutionally apply the part of the Massachusetts statute which gives a cause of action for wrongful death, and disregard the part of that statute which would make the defendant immune from such suit.[38] Certainly, such a splitting of the Massachusetts statute would prejudice the rights of the defendant. Application of the *Pearson* rationale, under such circumstances, would seem to undermine the entire rationale of the full faith and credit clause.

CONSTITUTIONAL LAW — SIXTH AMENDMENT AND DUE PROCESS — APPOINTMENT OF COUNSEL REQUIRED FOR INDIGENT DEFENDANT IN ALL CRIMINAL CASES. — Petitioner, an indigent defendant, convicted in a Florida state court of a felony — breaking and entering with intent to commit a misdemeanor — filed a habeas corpus petition in the Supreme Court of Florida alleging that the refusal of the trial court to appoint defense counsel was a denial of his right to counsel as guaranteed by the sixth amendment of the federal constitution.[1] That court denied relief.

---

[37] However, the dissent in *Pearson* would not make such an argument. A layman would certainly feel that he would have been prejudiced if his liability were extended from $15,000 to $160,000 (the amount recovered by the plaintiff in the present case). Pearson v. Northeast Airlines, Inc., *supra* note 32, at 567-68.

[38] The argument has also been made that since the Massachusetts statute is the source of the plaintiff's right to maintain the wrongful death action, the Massachusetts legislature, by providing for the liability limitation, intended to create only a limited right where none existed before. 35 ST. JOHN'S L. REV. 357, 361 (1961).

[1] U.S. CONST. amend. VI provides in part that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense." Under the laws of the State of Florida, however, a court can only appoint counsel in criminal cases where a capital offense is charged. FLA. STAT. ANN. § 909.21 (1944).

The Supreme Court of the United States reversed, and *held* the sixth amendment's guarantee of the right to counsel to be so fundamental and essential to a fair trial that the due process clause of the fourteenth amendment[2] requires the states to appoint counsel for indigent defendants in all criminal cases. *Gideon v. Wainwright,* 31 U.S.L. WEEK 4291 (March 18, 1963).

The rights of the individual as guaranteed by the first eight amendments of the federal constitution are considered to be inalienable. At various times, the Supreme Court has extended the protection of certain of these rights so as to preserve them from state as well as federal intervention.[3] It could be stated, moreover, that one of the most effective and direct methods of insuring the protection of these rights would be to provide the individual with the assistance and guidance of counsel. This would seem especially necessary in the criminal area where a violation of the accused's right to due process of law often leads to imprisonment, and in some cases, death.

There is no question that a defendant in a criminal prosecution in a federal court has an unqualified right to the assistance of counsel. In *Johnson v. Zerbst,*[4] the Supreme Court stated that the sixth amendment's guarantee of counsel withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty without counsel unless he has effectively waived this right.[5] The right to counsel was held to be necessary to insure fundamental due process to the defendant.[6] In state criminal prosecutions the constitutional right to counsel is also unqualified when the accused has sufficient means to employ counsel of his own.[7] The right of an indigent defendant, however, has not been considered as absolute, and the question

---

[2] U.S. CONST. amend. XIV, § 1 provides in part that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

[3] Grosjean v. American Press Co., 297 U.S. 233 (1936) (freedom of press); Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion); Staub v. City of Baxley, 355 U.S. 313 (1958) (freedom of speech; Mapp v. Ohio, 367 U.S. 643 (1961) (protection from unlawful searches and seizures); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment). *But see,* Hurtado v. California, 110 U.S. 516 (1884) where the Court held that due process of law does not include the fifth amendment's guarantee of an indictment by a grand jury; Palko v. Connecticut, 302 U.S. 319 (1937), where the Court held that the fifth amendment's guarantee against double jeopardy does not apply to the states.

[4] 304 U.S. 458 (1938).

[5] *Id.* at 463; Bridwell v. Aderhold, 13 F. Supp. 253, 254-55 (N.D. Ga. 1935); see Holtzoff, *The Right of Counsel Under the Sixth Amendment,* 20 N.Y.U.L.Q. REV. 1, 9 (1944).

[6] Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

[7] Chandler v. Fretag, 348 U.S. 3, 9 (1954). There the defendant was

of whether a state's refusal to appoint counsel for an indigent violates due process requirements has been the subject of numerous habeas corpus petitions over the past thirty years.

This question of the indigent's right to counsel was before the Supreme Court in the famous case of *Powell v. Alabama.*[8] In that case, seven defendants were convicted, in an Alabama state court, of the crime of rape, a capital offense in Alabama. The trial court had not appointed counsel until the day of the trial.[9] The Court in reversing the conviction stressed the fact that the right to counsel also includes the opportunity to prepare a defense.[10] It stated that under the circumstances—the youth, ignorance and illiteracy of the defendants, the fact that they were surrounded by a great deal of public hostility and most important the fact that they were on trial for their lives—"the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." [11]

In *Betts v. Brady,*[12] however, the Court determined that the decision in *Powell* was restricted to its individual facts. In *Betts,* the petitioner, convicted of robbery in a Maryland state court, contended that the refusal of the trial court to appoint counsel was a violation of the due process clause of the fourteenth amendment. In affirming the conviction, the Court stated that the right to counsel in the sixth amendment applies only to trials in

---

informed on the day of the trial that not only was he to be charged with larceny but also with being an habitual criminal. His waiver of counsel on the larceny charge was held not to affect his right to obtain counsel for the habitual criminal charge, and the refusal of the trial court to allow him an opportunity to do so violated the due process clause of the fourteenth amendment.

[8] 287 U.S. 45 (1932).

[9] The fact that counsel was not appointed until the day of trial was due to a misunderstanding between the trial judge and the local bar association. The judge had appointed the entire bar to represent the defendants at the arraignment; however no one member did anything by way of preparation for the defense.

[10] Powell v. Alabama, 287 U.S. 45, 71 (1932); see also Avery v. Alabama, 308 U.S. 444 (1940) wherein it was held that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Id.* at 446; *cf.* Ferguson v. Georgia, 365 U.S. 570 (1961), where a statute which prohibited a defendant from testifying in his own behalf in a capital case was held to violate due process of law. If such a statute were given effect, then the right to counsel would be of little worth.

[11] Powell v. Alabama, *supra* note 10.

[12] 316 U.S. 455 (1942).

federal courts.[13] While the fourteenth amendment does not incorporate as such the specific guarantees found in the sixth amendment, a denial by a state of rights specifically embodied in that amendment could, under certain circumstances, deprive an accused of due process of law in violation of the fourteenth amendment.[14] In a poll of state law, the Court concluded that the majority of jurisdictions did not consider the appointment of counsel a fundamental right, essential to a fair trial.[15]

In cases subsequent to *Betts*, the Court has applied the special circumstances test of *Betts* to determine whether the failure to appoint counsel violated due process requirements. The Court has not only adhered to the circumstances found in the *Powell* case, but has also held such factors as questionable sanity,[16] peculiarity of the crime[17] and the pleading of a defense at an arraignment proceeding[18] sufficient to require the appointment of counsel.

In reaching its decision in the instant case, that the states must appoint counsel for indigent defendants in all criminal cases, the Court expressly overruled its decision in *Betts*.[19] The Court stated that the sixth amendment's guarantee of counsel is fundamental and essential to a fair trial, and is therefore made obligatory upon the states by the fourteenth amendment.[20] The Court, adopting the rationale of *Powell*, stated that the right to be heard would be meaningless unless it was a right to be heard by counsel. Even the intelligent defendant does not possess the necessary legal training to determine such elements as: (1) the accuracy

---

[13] *Id.* at 461; see Bute v. Illinois, 333 U.S. 640, 662-63 (1948).

[14] Betts v. Brady, 316 U.S. 455, 461-62 (1942).

[15] *Id.* at 471.

[16] Moore v. Michigan, 355 U.S. 155 (1957).

[17] Carnley v. Cochran, 369 U.S. 506 (1962) (sexual intercourse with thirteen-year old daughter).

[18] Hamilton v. Alabama, 368 U.S. 52 (1961) (Alabama procedure required that the defense of insanity be pleaded at the arraignment or else it is deemed waived. The Court held that counsel must be appointed for the arraignment).

[19] Gideon v. Wainwright, 31 U.S.L. WEEK 4291, 4292 (March 18, 1963); Mr. Justice Black, the author of the majority opinion in the instant case, has been opposed to *Betts* since the day it was decided, as is evidenced by his dissenting opinion in that case. Recently in *Carnley v. Cochran, supra* note 17, at 519, he wrote, in a concurring opinion, that *Betts* was a denial of fundamental fairness and shocking to the universal sense of justice. Further, the decision has not served as a guide, but has only confused the state courts as to when a defendant is entitled to have counsel appointed.

[20] Gideon v. Wainwright, *supra* note 19, at 4293; see Grosjean v. American Press Co., 297 U.S. 233 (1936) where the Court stated that the due process clause of the fourteenth amendment protects from state action the rights of the individual guaranteed by the first eight amendments. *Id.* at 243-44.

of the indictment, (2) the competency and admissibility of evidence, (3) the correctness of a charge, and (4) the preparation of a defense.[21] The Court concluded that unless the poor man charged with a crime is also guaranteed the assistance of counsel, the ideal of "fair trials before impartial tribunals in which every defendant stands equal before the law" [22] could not be realized.

In holding that the Constitution requires the states to appoint counsel in all criminal cases, the Court has undoubtedly raised serious questions as to what, if any, procedural and substantive changes the states will be required to make to satisfy constitutional requirements. It has already been noted that the Court in *Powell* did not consider appointment of counsel on the day of trial to be due process of law. But, in the next few years the Court will be faced with far more subtle issues. Of these will be the question of at what stage in its criminal proceedings must a state provide for the appointment of counsel.

Under the present federal procedure, counsel must be appointed for an indigent defendant at the arraignment to the indictment, unless the defendant effectively waives his right.[23] A defendant, however, does not have the right to the assignment of counsel at the time he is brought before a commissioner subsequent to his arrest. It is only required that the commissioner inform the defendant of his right to retain his own counsel, and allow him time to do so if he so wishes.[24] An amendment has

---

[21] Gideon v. Wainwright, *supra* note 19, at 4294.

[22] *Ibid.*

[23] FED. R. CRIM. P. 44 provides that "if the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." See McNair v. United States, 235 F.2d 856 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 989 (1957); United States v. Kratz, 97 F. Supp. 999 (D. Neb. 1951); 4 BARRON, FEDERAL PRACTICE AND PROCEDURE § 2462 (Rules ed. 1951). The author notes that Rule 44 was designed to indicate that the right to have counsel appointed by the court relates only to proceedings in court, and, therefore, does not include preliminary proceedings before a commissioner. In Moore v. Michigan, 355 U.S. 155 (1957), the Court held that for a waiver of counsel to be effective it must be made intelligently and understandingly. The circumstances presented—defendant was 17 years of age with only a seventh-grade education and a possible question as to his sanity—made an effective waiver impossible. *Id.* at 164-65.

[24] FED. R. CRIM. P. 5(b) provides that "the Commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination." This Rule has been interpreted to mean that there is no right to have counsel appointed at the proceedings before the commissioner. Burall v. Johnston, 146 F.2d 230 (9th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945); United States v. Killough, 193 F. Supp. 905, 914 (D.D.C. 1961); Rackow, *The Right to Counsel—Time for Recognition Under the Due Process Clause*, 10 W. RES. L. REV. 216, 230 (1959).

been proposed, however, to change the procedure before the commissioner.[25] This amendment, if adopted, would require the commissioner not only to inform the defendant of his right to retain his own counsel, but also of his right to request the assignment of counsel.

The procedure in New York is similar to the federal procedure when a defendant is charged with a felony. Section 308 of the Code of Criminal Procedure requires the court to appoint counsel for the indigent defendant at the arraignment to the indictment.[26] Section 188 gives no right to appointment of counsel before the committing magistrate, but the magistrate, like the federal commissioner, must inform the defendant of his right to retain his own counsel.[27] There are, however, presently no proposed changes for the New York procedure. But this is not to say that New York does not recognize the need for counsel before the arraignment stage of its proceeding. The Court of Appeals has recently held that statements made to the police after the arraignment to the charge but prior to the indictment are inadmissible as evidence unless given by a defendant who had the benefit of counsel at the time.[28]

But, should the Supreme Court adopt the proposed amendment to the Federal Rules, the question arises whether the change would indicate that the Court considers appointment of counsel before the commissioner necessary to meet due process requirements.[29]

---

[25] COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, U.S. JUDICIAL CONFERENCE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Rule 5 (1962). The committee's notes on the proposed change of Rule 44 state that the purpose of the amendments to that Rule and Rule 5 is "to provide for the assignment of counsel to indigent defendants at the earliest possible time and without waiting until the defendant appears in court."

[26] N.Y. CODE CRIM. PROC. § 308 provides that "if the defendant appears for arraignment without counsel, he must be asked if he desires the aid of counsel, and if he does the court must assign counsel." In People v. Crimi, 278 App. Div. 997, 105 N.Y.S.2d 620 (3d Dep't 1951) (memorandum opinion), *aff'd*, 303 N.Y. 749, 103 N.E.2d 538 (1952) (memorandum opinion) the Appellate Division held that a 16 year old defendant's personal interpretation of advice given by the court as to his right to appointed counsel was insufficient to show that the defendant had not effectively waived his right to counsel.

[27] N.Y. CODE CRIM. PROC. § 188 provides that "when the defendant is brought before a magistrate upon an arrest . . . the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had." Section 189 requires the magistrate to allow the defendant reasonable time to send for counsel.

[28] People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962). For an interesting treatment of this case see 37 ST. JOHN'S L. REV. 155 (1962).

[29] It has been stated before that the crucial time for the assistance of

If it does, then it would seem that the instant case would require New York, and the other states also, to provide for appointment at that stage.

The requirement of appointment of counsel in all criminal cases will also greatly affect the states on the question of the type of crimes for which appointment of counsel will be required. In the federal courts, the sixth amendment has been interpreted to require appointment of counsel in both felony and misdemeanor cases.[30] The majority of states, on the other hand, only provide for appointment of counsel in felony cases.[31] While it is clear in New York that section 308 applies in felony cases,[32] the right of an indigent defendant, under that section, to have counsel appointed in a misdemeanor case is subject to conflicting views. One author is of the opinion that such a right does exist.[33] On the other hand, the small amount of decision writing on this point is to the effect that the right to counsel under section 308 is only applicable to crimes which are prosecuted by an indictment.[34] In any event, such a conflict is now academic for the position of the Court in the instant case on this question is open to but one interpretation, *i.e.*, that appointment of counsel in all criminal cases also includes misdemeanor prosecutions. It is thus clear that this decision will require immediate changes in many state procedures.

---

counsel is at the very beginning of the case, long before the trial stage is reached. An accused person needs counsel soon after arrest and before anything is done to prejudice his rights. Slovenko, *Representation for Indigent Defendants,* 33 TUL. L. REV. 363, 370-71 (1959); 1 CHAFEE, FUNDAMENTAL HUMAN RIGHTS 541 (1951), states that "a person needs a lawyer right after his arrest probably more than at any other time."

[30] McNeal v. Culver, 365 U.S. 109 (1961) (assault with intent to murder); Johnson v. Zerbst, 304 U.S. 458 (1938) (counterfeiting); Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942) (nonsupport and maintenance of a minor child); Bridwell v. Aderhold, 13 F. Supp. 253 (N.D. Ga. 1935) (counterfeiting); see Fellman, *The Constitutional Right to Counsel In Federal Courts,* 30 NEB. L. REV. 559 (1951), wherein the author states that "'no reason appears in logic, morals, or humanity' why any person accused of any crime should be denied this fundamental right." *Id.* at 594.

[31] See the appendix to the concurring opinion of Mr. Justice Douglas in *McNeal v. Culver, supra* note 30, at 119-22, where it is noted that thirty-five states provide for appointment of counsel for indigent defendants in felony cases only, and the other fifteen states either make no explicit provision for appointment of counsel, or provide for appointment only in capital cases, or leave the appointment of counsel to the discretion of the trial judge.

[32] People v. Price, 262 N.Y. 410, 413, 187 N.E. 298, 299 (1933); People v. Borgstrom, 178 N.Y. 254, 256, 70 N.E. 780 (1904); People v. Crimi, *supra* note 26.

[33] Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment,* 27 BROOKLYN L. REV. 24 (1961), citing People v. Marincic, 2 N.Y.2d 181, 139 N.E.2d 529, 158 N.Y.S.2d 569 (1957) (defendant not given opportunity to obtain own counsel).

[34] People v. Meers, 28 Misc. 2d 60, 211 N.Y.S.2d 648 (Sup. Ct. 1960).

The more difficult questions, however, will arise in the area where the charge is technically neither a felony nor a misdemeanor. Juvenile offenses, for example, are in such a class in New York.[35] Since such offenses, if committed by an adult, would be felonies or misdemeanors, the legislature has taken steps to protect the rights of the juvenile by providing that similar rules of procedure and evidence apply in the juvenile hearing.[36] Also, since there is little doubt that the juvenile who has been placed in a reformatory, because of his delinquency, has been deprived of his liberty, there is a question of whether a juvenile hearing comes within the meaning of a criminal case, and whether the Supreme Court will also require appointment of counsel for indigent delinquents.[37]

Somewhat analogous to the juvenile offense is the traffic violation. While such violations are neither felonies nor misdemeanors, a number of violations within a certain period of time will result in a revocation of a license.[38] A revocation of a license would seriously affect, for example, the unemployed person whose livelihood requires him to drive a car or truck. Under such circumstances, the revocation would not only be a deprivation of property, but also the means to earn a living. Considering these serious consequences, it might be argued that due process would require the appointment of counsel for the indigent motorist.

The determination of whether a defendant should be classified as an indigent and thus have the right to have counsel appointed will also present a perplexing problem to the state courts. Since such determinations, by their very nature, will depend upon the facts in the individual case, it is unlikely that the Supreme Court will be able to establish a workable rule to assist the states on this question. The courts will be faced, for example, with the problem of a migrant worker who, with $80 in his pocket, is

---

[35] N.Y. PEN. LAW § 2186 provides in part that "a child of more than seven and less than sixteen years of age, who shall commit any act or omission which is committed by an adult, would be a crime, except any child fifteen years of age who commits an act which if committed by an adult would be punishable by death or life imprisonment, . . . shall not be deemed guilty of any crime, but of juvenile delinquency only. . . ."

[36] See People v. Lewis, 260 N.Y. 171, 178, 183 N.E. 353, 355 (1932); People v. Fitzgerald, 244 N.Y. 307, 312-13, 155 N.E. 584, 586-87 (1927); PAPERNO & GOLDSTEIN, CRIMINAL PROCEDURE IN NEW YORK § 158(a) (1960).

[37] A similar question will arise in the prosecution of youthful offenders. N.Y. CODE CRIM. PROC. §§ 913-e-913-r; see People v. Manfredi, 27 Misc. 2d 7, 8, 215 N.Y.S.2d 781, 783 (Schenectady County Ct. 1960), where it was held that a youthful offender trial is essentially a criminal trial.

[38] N.Y. VEHICLE AND TRAFFIC LAW § 510(2)(c) provides for mandatory revocation of a license where three speeding violations are committed within eighteen months.

arrested for disorderly conduct. Does the fact that he has $80 mean that he must supply his own counsel? Another example is the worker who earns just enough to supply his family. Should such a person be required to incur debt to obtain counsel, or should he be classified as an indigent and therefore have counsel appointed? [39] It is to be noted that the answers to these questions will have greater significance than ever before. An erroneous determination on the question of a defendant's right to have counsel appointed will result in a reversal of a conviction, since the failure to appoint counsel will now be deemed a violation of due process of law.

The decision of the Court, in the instant case, will no doubt have a great effect upon the criminal proceedings in state courts. It will require the states to re-examine and, in the majority of cases, amend their laws so as to conform with the requirements of the Constitution. Such examinations and amendments will not come easy in some cases since it has long been considered the right of the individual state to determine the procedure to be followed in its courts.

As to the correctness and desirability of the decision, however, there would seem to be little doubt. When one considers the complexities of a criminal prosecution, and the economic and social effects a conviction has upon a defendant, the need for counsel for all defendants is clearly shown. It makes little sense to say that due process of law requires an opportunity be given the defendant who has the means to employ counsel to protect his rights, and then to say that the same law does not require that counsel be appointed to assist the indigent defendant who has the same rights at stake. If the above statement be true, then it might well be said that the decision in the instant case has been long overdue.

---

[39] Under the present New York law a person may defend or prosecute as a poor person in a civil action if he "is not worth three hundred dollars in cash or available property besides the wearing apparel and furniture necessary for himself and his family. . . ." N.Y.R. CIV. PRAC. 35, 37. Under such circumstances the court also assign counsel. N.Y.R. CIV. PRAC. 36. Would such a test be constitutionally acceptable in the criminal area? Under the new Civil Practice Law and Rules the three hundred dollar requirement has been eliminated for the more flexible test of whether or not the party is "unable to pay the costs, fees and expenses necessary to prosecute or defend the action. . . ." N.Y. CIV. PRAC. LAW & RULES § 1101(a).