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State not Required to Provide Counsel on Appeal to Supreme Court

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answered, viz., is the defendant in a state court entitled to the instruction that his failure to testify creates no presumption against him? The defendant in a federal court is entitled to this instruction, but the basis for this right has always been merely statutory.²⁸

It appears that when the question does arise the Supreme Court will hold that such instruction is required, since an inference of guilt drawn by a jury would penalize a defendant for exercising his constitutional right.²⁹

As previously noted, the recent trend of the Supreme Court has been to "absorb" specific procedural safeguards of the bill of rights into the due process clause thereby making them applicable to the states.³⁰ From a moral and logical point

²⁸ See *Bruno v. United States*, 308 U.S. 287 (1939).

²⁹ See *Griffin v. California*, *supra* note 20, at 614-15.

³⁰ See note 22 *supra*.

of view, there seems to be little doubt that a defendant in a state criminal prosecution should be protected by the fundamental procedural safeguards found in the bill of rights. However, one vital question still remains: is the Supreme Court constitutionally justified in finding that these procedural safeguards are contained in the due process clause of the fourteenth amendment.

If, as a minority of the Justices have stated, the Court has expanded the concept of due process beyond all rational basis,³¹ then the Supreme Court has, in effect, usurped the authority of Congress and has effected by judicial decision what can properly be done only by constitutional amendment.

³¹ See, e.g., Mr. Justice Harlan's dissenting opinion in *Malloy v. Hogan*, *supra* note 22, at 14; see also Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

State not Required to Provide Counsel on Appeal to Supreme Court

Appellant, an indigent, was convicted of escaping from an honor farm of the state penitentiary. He filed a petition for habeas corpus in the district court, asserting that the rights afforded him by the equal protection and due process clauses of the fourteenth amendment had been violated by the refusal of the Supreme Court of New Mexico to appoint counsel to assist him in appealing to the United States Supreme Court. The district court denied relief. The

Court of Appeals affirmed and *held* that a state court is not required to appoint counsel for an indigent in taking such an appeal. *Peters v. Cox*, 341 F.2d 575 (10th Cir. 1965).

The right to counsel has been recognized in federal criminal proceedings since the adoption of the federal constitution.¹ Although the unqualified *right* existed, the

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 defence."

exercise of this right was dependent upon the defendant's ability to remunerate counsel for his services. There was, therefore, unequal treatment of the rich and the poor, which tenaciously remained until the decision in *Johnson v. Zerbst*.²

In *Zerbst*, the Supreme Court held that the sixth amendment enjoined the federal courts from denying any defendant representation by counsel unless he had waived this right.³ Since this holding was applicable only to the federal courts, the question of the indigent's right to court-appointed counsel in a state court remained unanswered.

The decision in *Powell v. Alabama*⁴ provided a partial answer. Seven defendants, convicted of rape, a capital offense under Alabama law, filed a petition for habeas corpus, contending that the failure of the trial court to provide counsel, before the date of trial, was a denial of due process. The Supreme Court held that, considering the youth and ignorance of the defendants, as well as the penalty, "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."⁵ It should be emphasized

that it was not the question of indigency which was before the Court, but rather, the general inability to secure counsel.

The question of *indigency* was dealt with by the Supreme Court in *Betts v. Brady*.⁶ *Betts* was convicted of a non-capital felony at a trial wherein the court had refused to appoint counsel although the defendant was financially unable to secure representation. The Supreme Court, in affirming the conviction, stated that the sixth amendment's guarantee of a right to counsel applied only to trials in the federal courts.⁷ The Court added, however, that there could be certain circumstances under which denial of counsel would be the equivalent of a denial of due process.⁸ While *Powell* clearly enunciated the "necessity of counsel," *Betts* made the right to counsel effective only in cases of "special circumstances."⁹ *Betts* was the bridge between the theoretical right to counsel and its practical application—the latter, was finally realized in *Gideon v. Wainwright*.¹⁰

Gideon, convicted of a felony, alleged that denial of court-appointed counsel was a breach of the sixth amendment. The Supreme Court reversed his conviction, maintaining that such a denial in a felony trial was, indeed, violative of due process.

² 304 U.S. 458 (1938).

³ *Id.* at 463; see Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U.L.Q. REV. 1, 9 (1944).

⁴ 287 U.S. 45 (1932).

⁵ *Id.* at 71; see also *Avery v. Alabama*, 308 U.S. 444 (1940), for a discussion of the nature of effective appointment of counsel. The Court there stated 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 the accused be given the assistance of counsel." *Id.* at 446.

⁶ 316 U.S. 455 (1942).

⁷ *Id.* at 461.

⁸ *Id.* at 461-62.

⁹ The "special circumstances" rule has been adhered to when certain factors were present, viz., questionable intelligence and ability to understand the proceedings. (*Moore v. Michigan*, 355 U.S. 155 (1957)); the peculiar circumstances of the crime (*Carnley v. Cochran*, 369 U.S. 506 (1962)); the pleading of a defense at the arraignment which would be sufficient to demand the appointment of counsel (*Hamilton v. Alabama*, 368 U.S. 52 (1961)).

¹⁰ 372 U.S. 335 (1963).

Gideon provides for the appointment of counsel to the indigent on the *trial* level—does it follow that a state court must furnish an attorney to aid the indigent in taking an *appeal*? The instant case answered this question in the negative, stating that there is no right to court-appointed counsel when appealing from a state court to the Supreme Court.¹¹ Since no authority was cited or found “*requiring or even permitting* a state supreme court to appoint counsel for an indigent . . . on his appeal to the United States Supreme Court,”¹² the Court in *Peters* felt itself unable to act.

It is true that there is no authority which *directs* a state court to appoint counsel under the circumstances of the principal case. However, *Douglas v. California*,¹³ specifically cited by the court in the instant case, indicated the potential *permissibility* of court-appointed counsel in an appeal of this nature.

In *Douglas*, indigent petitioners were convicted of thirteen felonies and sentenced to imprisonment. On appeal as of right, the California state court refused to appoint counsel since, on review of the merits, the appeal was thought to be of such a nature as to preclude success.¹⁴ The Supreme Court reversed, holding that where the merits of the indigent's initial appeal in the state courts are presented without benefit of counsel, such a discrimination exists between rich and poor as to be violative of the fourteenth amendment.¹⁵ The Court specifically restricted its holding to the question of an appeal in a state court, and stated that it was not

considering the indigent's plight in taking an appeal from the state to the United States Supreme Court.¹⁶

The tenth circuit, in precluding the indigent's effective appeal in the instant case, limited its consideration of *Douglas* to the narrow question formally answered therein, *i.e.*, appeals to *state* courts. It would appear that the Court's unwarranted demand for direct precedent as a prerequisite to favorable action is unrealistic in view of the developing trend in American law which has looked with disfavor upon the invidious system which would allow the kind of appeal a man enjoys to depend “on the amount of money he has.”¹⁷

Judge Learned Hand once remarked, “if we are to keep our democracy there must be one commandment: Thou shalt
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¹⁶ In *Powell v. Alabama*, 287 U.S. 45 (1932), an opinion was expressed which demonstrates the almost inevitable results of such a decision as that in the principal case. Acknowledging that even the educated layman generally lacks any skill in the law, the Court proceeded to point out that no amount of intelligence or education can replace the guiding hand of counsel. If the intelligent have this need, without which they risk the danger of conviction due to an inability to establish their innocence, “how much more true is it of the ignorant and illiterate, or those of feeble intellect.” *Id.* at 69.

Cf. *Gideon v. Wainwright*, *supra* note 10, where the Court asserted: “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. . . . There are few defendants charged with crime, few indeed, who fail to hire the best lawyer they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities not luxuries.” *Id.* at 344.

¹⁷ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

¹¹ *Peters v. Cox*, 341 F.2d 575 (10th Cir. 1965).

¹² *Ibid.*

¹³ 372 U.S. 353 (1963).

¹⁴ 187 Cal. App. 2d 802, 812, 10 Cal. Rep. 188, 195 (1960).

¹⁵ *Douglas v. California*, 372 U.S. 353 (1963).

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not ration justice."¹⁸ Is not justice rationed in favor of the wealthy defendant when he is represented by proficient and experienced counsel, as against the indigent who is forced by decisions such as that in *Peters* to prepare and present his own appeal to the Supreme Court? Since the Supreme Court has ordered counsel to be appointed for indigents at criminal trials,

¹⁸ Ervin, *Uncompensated Counsel: They Do Not Meet The Constitutional Mandate*, 49 A.B.A.J. 435 (1963).

the holding of *Peters* seems inconsistent with the philosophy inherent in prior case law. By virtue of the instant case, the indigent's guarantee of representation will be terminated not in a lower court, but rather at the doorstep of the court from which that guarantee emanates. It becomes evident that only with respect to appeals to the Supreme Court will the discrimination between rich and poor, arising from a denial of appointed counsel, survive. This, in the very court which so emphatically condemned any discriminatory practice based on wealth!