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Criminal Law: Appointment of Counsel for Indigent Defendent in Non-Capital State Court Proceeding Required by Due Process of Fourteenth

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the attorney-client privilege. This law is now completely unsettled between the *Philadelphia* and *Radiant Burners* cases. When it is decided whether or not federal precedents will extend the privilege to a corporation, then it must be decided whether these precedents or the prevailing law of the state in which the federal court is sitting must control. It seems that when the question finally becomes settled, the most probable result will be that a corporate client would be entitled to claim the attorney-client privilege by virtue of a combination of federal and state precedents in a "federal question" case and that state privileges will control, as substantive law, in a diversity case.[25]

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Criminal Law: Appointment of Counsel for Indigent Defendant in Non-Capital State Court Proceeding Required by Due Process Clause of Fourteenth Amendment—On March 18, 1963 the United States Supreme Court overruled a decision of twenty-one years standing and held that the State of Florida's failure to appoint defense counsel in a non-capital criminal case deprived the petitioner of due process as guaranteed by the Fourteenth Amendment. *Gideon v. Wainwright.*[1]

Petitioner Gideon was charged in a Florida court with having broken and entered a poolroom with intent to commit a misdemeanor—a felony under Florida law. Being indigent, petitioner asked the court to appoint counsel for him. The court denied this request on the basis that no capital offense was charged and that under the law of Florida, counsel need be appointed only in capital cases. Petitioner conducted his own defense, was convicted and sentenced to a term of five years. After state habeas corpus proceedings were exhausted, the Supreme Court granted certiorari in order to review the question of possible violation of constitutional rights with special attention to the then controlling decision of *Betts v. Brady.*[2]

The facts in the *Gideon* case are remarkably similar to those of the 1942 *Betts* case. In both proceedings the defendant requested counsel in a non-capital felony charge; in both cases counsel was denied and the defendant was forced to conduct his own defense without in any way waiving his rights. However, in the *Betts* case, the rule was laid down that due process was a flexible concept which must be tested by an appraisal of the totality of facts in a given case.

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[25] See, holding to this effect, Comercio E. Industria Continental v. Dresser Industries, 19 F.R.D. 513 (S.D.N.Y. 1956); Georgia Pacific Plywood Co. v. United States Plywood Corp.; 18 F.R.D.. 463 (S.D.N.Y. 1956); see also, Note, 46 MARQ. L. REV. 551 (1963) for other holdings to the same effect.

[1] 372 U.S. 335 (1963).

[2] Betts v. Brady, 316 U.S. 455 (1942).

> That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[3]

Having approximately the same circumstances before them in 1963, the Court has seen fit to overrule this decision. The reason set forth is that the guarantee of the Sixth Amendment, which is that "In all criminal proceedings, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense," is of such a fundamental nature that it is incorporated into the concept of due process embodied in the Fourteenth Amendment. Right to counsel is therefore as applicable to the states as the Sixth Amendment mandate is applicable in the federal courts. The argument which the Court now approves was precisely the same argument which was advanced by Betts in 1942 and rejected.

A brief outline of the litigation concerning right to counsel begins with *Johnson v. Zerbst*[4] which laid down the rule that a person charged with any crime, capital or noncapital, was entitled to the assistance of counsel for his defense in the federal courts. In applying "right to counsel" for state court proceedings, the Supreme Court had already provided in the famous *Scottsboro* case that in criminal cases involving a capital offense, the Fourteenth Amendment required counsel to be appointed by the state, *Powell v. Alabama.*[5] The rationale for the *Powell* decision was that the Fourteenth Amendment "embraced" those "fundamental principles of liberty and justice which lie at the base of all our civic and political institutions"; and that the right to counsel in a capital case was of such a "fundamental nature" that it is protected by the due process requirements of the Fourteenth Amendment. Thus the Court in the *Powell* case could avoid deciding whether the Sixth Amendment was thereby incorporated into the Fourteenth Amendment.

Following the *Powell* and *Zerbst* decisions, the question of whether *non-capital criminal* proceedings in a state court required appointment of counsel was soon litigated. *Betts v. Brady*[6] in 1942 clearly rejected the strict application of the Sixth Amendment to the state courts by way of the due process requirements of the Fourteenth Amendment. Instead, the Court set forth the "flexible standard" as indicated above, which resulted in a testing of due process by the facts in the case which either would indicate an obvious denial of due process or which were such flagrant abuses of the concept of "fair trial." When the Court

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[3] *Ibid.* at 462.
[4] Johnson v. Zerbst, 304 U.S. 458 (1938).
[5] 287 U.S. 45 (1932).
[6] *Supra* note 2.

found such violations, convictions were set aside;[7] when the facts did not demonstrate such abuses, the convictions were upheld.[8]

The Supreme Court today feels obliged to return to what the Court believes is a sounder basis for insuring the constitutional guarantees of justice in the courts, both state and federal. In Justice Black's own words:

> The fact is that in deciding as it did—that 'appointment' of counsel, is not a fundamental right, essential to a fair trial'—the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.[9]

Thus by the majority view, an expanded right to counsel takes its place with the other fundamental rights which have been heretofore protected from encroachment by the states by means of the due process clause of the Fourteenth Amendment.

Justice Harlan in a concurring opinion felt that the "special circumstances" rule of *Betts* must now be abandoned since:

> The Court has come to recognize, . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.[10]

The fact that the charge against Gideon was a "serious criminal" one may bear some weight in qualifying the *Gideon* decision, especially since Justice Harlan notes that "whether the rule should extend to *all* criminal cases need not now be decided."[11] (Emphasis by Court). In addition Justice Harlan makes it clear that he does not believe that by holding the right to counsel applicable to the states in this particular case, the Court is thereby embracing "the concept that the Fourteenth Amend-

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[7] A few examples of the type of special circumstances which the Court has deemed important enough to justify reversal would include: Massey v. Moore, 348 U.S. 105 (1954) (insane man stood trial without counsel); Palmer v. Ashe, 342 U.S. 134 (1951) (imbicile); Townsend v. Burke, 334 U.S. 736 (1948) (prejudicial commentary by court); Smith v. O'Grady, 312 U.S. 329 (1940) (uneducated man tricked into pleading guilty).

[8] Circumstances which have not warranted reversal under the *Betts v. Brady* rule are found in Com. *ex. rel.* Hovis v. Ashe, 67 A.2d 770 (Pa. 1949) (mere lack of counsel not tantamount to deprivation of due process); State ex rel. Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849 (1947) (Defendant did not want to be represented by counsel); Dinsmore v. Alvis, 88 Ohio App. 321, 96 N.E.2d 421 (1951) (indigent defendant); Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949) (indigent defendant).

[9] *Supra* note 1, at 343, 344.

[10] *Supra* note 1, at 351.

[11] *Supra* note 1, at 351.

ment 'incorporates' the Sixth Amendment as such."[12] The consequence of this qualification is that, as Justice Harlan suggests, there will be no automatic transferring of an entire body of Federal law for application to the states. It is clear then that he believes the guarantees of right to counsel stem directly from the Fourteenth Amendment rather than as a "carryover" of Sixth Amendment federal restrictions.

In a very brief concurring opinion, Justice Douglas disagrees with his colleague Justice Harlan and reiterates his position of many years standing that:

> . . . rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.[13]

In a third concurring opinion Justice Clark feels "that the Constitution makes no distinction between capital and non-capital cases"[14] and that the distinction made in *Betts v. Brady*[15] had no logical foundation.

In examining the scope of the decision in the *Gideon* case, two major questions arise. One is to what extent does a criminal charge have to be "serious" in order to qualify a defendant for the right of assistance to counsel. The emphasis by Justice Harlan on an evaluation of the charge against the defendant represents some change from prior evaluations of the "special circumstances" rule.[16] Although the nature of the crime has always been one of the factors considered by the Court, it has been at most a factor considered along with the conduct of the trial and the disabilities of the individual defendant. Since the seriousness of the charge is determined by the potential penalty, the question of deprivation of liberty will be in direct proportion to the threatened jeopardy which a defendant faces. The normal classification of crimes into felonies and misdemeanors offers a convenient dividing line to determine the seriousless of a crime, but if one considers deprivation of liberty in its strictest sense, there is no reason to distinguish imprisonment under felonious violations of the law from imprisonment under misdemeanor charges. Indeed the length of imprisonment should be considered irrelevant if one were to construe the Fourteenth Amendment as strictly forbidding deprivation of liberty without due process of law, that is without the right to counsel. The Supreme Court has not made any committment to such a strict interpretation by the *Gideon* decision, and the obvious conclusion is that future litigation must test whether or not a criminal charge is of such a "serious" nature so as to require appoint-

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[12] *Ibid.*
[13] *Supra* note 1, at 347.
[14] *Supra* note 1, at 349.
[15] *Supra* note 2.
[16] *Supra* note 7.

ment of counsel in order to satisfy the due process requirements of the Fourteenth Amendment. Reading the *Gideon* decision alone, state judicial officers may find it difficult to determine whether or not appointment of counsel will be mandatory in border-line cases where the "seriousness" of the charge is a debatable issue.

The second important question for evaluation is the determination of the time when the right to counsel accrues. If Justice Harlan is correct in saying that the body of federal law in this area will not be transferred part and parcel to the states, then it remains to be decided as to what rules will be laid down for state court proceedings. The federal courts have generally adopted the rule that the right to counsel accrues only after an indictment has been returned by a grand jury.[17] Under existing state law, the time when right to counsel accrues varies. In those states where statutory requirements are set forth, the time when appointment of counsel must be made is generally specified.[18] In states where no statute governs appointment of counsel for indigent defendants, the decisions as to whether there has been a denial of due process has been based on whether or not failure to appoint counsel at a particular stage of the proceeding has resulted in a denial of the essentials of justice which constitute a fair trial.[19]

On the basis of conflicting state court decisions, the Supreme Court will undoubtedly have to decide what time the right to counsel becomes mandatory once it is necessary to appoint counsel in the particular case. Although the Sixth Amendment requires appointment of counsel "at every stage of the proceeding" this has been taken to refer only to post-indictment proceedings in federal courts.[20] The question is, will further clarification by the Court be necessary to determine at what level of the proceeding appointment of counsel will be necessary in order to preserve due process.

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[17] Gilmore v. U.S., 129 F.2d 199 (10th Cir. 1942); Council v. Clemmer, 177 F.2d 22 (D.C. Cir. 1949); Dorsey v. Gill, 148 F.2d 857 (D.C. Cir. 1945).

[18] *E.g.* Wis. Stat. §957.26(2) provides that "Upon arraignment and before plea, the court shall advise any person charged with a felony of his right to counsel and that if he is indigent the court will appoint counsel at his request." Some clarification in relation to state statutes has been made in Hamilton v. Alabama, 368 U.S. 52, (1961). In this decision it was held that where a statute declares a plea must be made at arraignment or else opportunity for such plea is lost, the appointment of counsel must be made at arraignment since it is such a "critical stage" of the proceeding. See also, White v. State of Maryland, —— U.S. ——, 83 Sup. Ct. 1050 (1963).

[19] Gallegos v. State of Neb., 342 U.S. 55, (1951) (right accrues at trial); Bryant v. U.S., 173 F.Supp. 574 (D.C.N.D. 1959) (When indictment returned); Michener v. Johnston, 141 F.2d 171 (9th Cir. 1944) (on arraignment); State v. Hudson, 55 R.I. 141, 179 Atl. 130 (1935), 100 A.L.R. 313 (1936) (any proceeding from return of indictment or information to final acquittal or conviction); State v. Yoes, 67 W.Va. 546, 68 S.E. 181 (1910); James v. State, 27 Wyo. 378, 196 Pac. 1045 (1921) (inidgent must claim the right in order to have counsel appointed).

[20] *Supra* note 17.

One final observation may be made concerning the overall motive for reversal of *Betts v. Brady*.[21] From the decisions since 1942 the Supreme Court has as a matter of policy expressed some distaste for attempted interference with the administration of justice in the state courts unless obvious constitutional violations are brought to its attention. The flexible rule set forth in Betts maintained the integrity of state judicial systems by limiting the amount of federal interference, and at the same time achieving the purpose of due process by assuring that the characteristics of fundamental fairness will prevail.[22] In 1963 it is clear that this policy, at least in relation to right to counsel, is no longer a controlling factor in the Court's reaching its decision in *Gideon v. Wainwright*,[23] by virtue of the fact that twenty-four Attorneys General filed briefs amici curiae seeking reversal of the conviction of petitioner Gideon. Thus practically one-half the states of the Union appear to be in accord with the view that the *Betts* decision should be overruled. It would appear then that the Supreme Court did not feel hesitant in deciding this far reaching rule as applicable to the states in light of the obvious approval of state judicial officers.

Although at first glance it appears that the Court has enunciated a principle which will tend to avoid future litigation as far as the "special circumstances" rule is concerned, nevertheless because many collateral areas are left untouched by the decision, much litigation must follow before a clear statement of the law in this area is established. When state courts are faced with the problem of indigent defendants in non-capital criminal cases where the question of appointment of counsel must be determined, there must be a workable rule under which they can operate, especially in light of the fact that many states have their own statutes operating in this area.

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Governments: Inapplicability of the Doctrine of Estoppel as Applied to a City in the Exercise of Governmental Functions— Plaintiff, the owner of two duplex apartment buildings and a cottage situated on a single lot, converted the duplexes to four family units in 1931 without obtaining a building permit as required by municipal ordinance. The zoning regulations permitted nothing larger than two family dwellings. In their new form the buildings had 7,000 square feet of liv-

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[21] *Supra* note 2.

[22] This theory was cogently expressed by Justice Frankfurter writing the majority opinion in Foster v. Illinois, 332 U.S. 134, 139 (1947);" . . . (the concept of due process) . . . is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the states have lived not only before the Fourteenth Amendment but for the eighty years since its adoption. . . ."

[23] Gideon v. Wainwright, *supra* note 1.