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Constitutional Law-Federal Criminal Procedure-Right to Counsel Under Section 2255 of the Judicial Code

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CONSTITUTIONAL LAW—FEDERAL CRIMINAL PROCEDURE—RIGHT TO COUNSEL UNDER SECTION 2255 OF THE JUDICIAL CODE—Petitioner, seeking to attack a conviction for illegal possession of narcotics,[1] was granted leave to sue in forma pauperis under 28 U.S.C. section 2255,[2] but his request that counsel be appointed for him was denied. Petitioner's section 2255 motion to vacate judgment was denied.[3] Petitioner then entered a second section 2255 petition alleging basically the same errors but adding that the court had erred in not appointing counsel for his first petition. The second motion was denied without a hearing on the ground that it was "the second or successive motion for similar relief . . . ."[4] Petitioner appealed in forma pauperis to the Seventh Circuit from the denial of his second section 2255 motion. The Seventh Circuit unanimously affirmed the district court's

1 The conviction was affirmed in United States v. Campbell, 282 F.2d 871 (7th Cir. 1960).

2 "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence . . . . The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U.S.C. § 2255 (1958).

3 The Supreme Court denied certiorari on this motion. 369 U.S. 825 (1962).

4 28 U.S.C. § 2255 (1958).

denial of the second section 2255 motion.[5] On rehearing, *held*, reversed. The rationale of the recent Supreme Court decision in *Gideon v. Wainwright*[6] indicates that counsel must be appointed for an indigent in a section 2255 proceeding. *Campbell v. United States*, 318 F.2d 874 (7th Cir. 1963).

In *Johnson v. Zerbst*[7] the Supreme Court held that, in general, a defendant has a right to counsel in federal criminal trials, and recently this right was extended to encompass federal criminal appeals.[8] However, the Supreme Court has never decided specifically whether such a right exists in a third substantial area of federal criminal litigation, namely, collateral attack proceedings as prescribed by 28 U.S.C. section 2255.[9] In the absence of a definitive Supreme Court ruling upon this issue, the circuit courts have reached variant results.[10] In a majority of the circuits the appointment of counsel for a section 2255 proceeding is purely discretionary.[11] A few circuits have held that the right to counsel in a section 2255 proceeding is contingent upon the nature of the issues raised under the motion;[12] and in one case the Second Circuit suggested that the right may indeed be absolute.[13] The majority rule is apparently based on the idea that section

5 No. 13846, 7th Cir., March 18, 1963.

6 372 U.S. 335 (1963).

7 304 U.S. 458 (1938).

8 See Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Douglas v. California, 372 U.S. 353 (1963); Ellis v. United States, 356 U.S. 674 (1958); Johnson v. United States, 352 U.S. 565 (1957). Some gaps still remain in the appellate procedure. For example, in the interim period between conviction and appointment of appeal counsel the indigent is left to his own devices to get necessary papers filed in time to maintain appellate privileges. See Bosky, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

9 In addition, the Supreme Court has never decided the issue of right to counsel in habeas corpus proceedings. A § 2255 motion is, by the terms of the statute, either a substitute for, or a preliminary action to, a habeas corpus proceeding. The purpose of § 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and witnesses to the district of confinement. Habeas corpus actions must be brought in the district of confinement. As a result, § 2255 generally enjoys more popularity than habeas corpus as a means of collateral attack.

10 It should be noted that although § 2255 does not specifically provide for the representation of the prisoner by council, the indigent can make use of § 1915(d), which provides for counsel in federal proceedings. "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (Supp. IV, 1963). The discretionary language in § 1915(d) has been interpreted to provide an absolute right to counsel. Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Johnson v. United States, 352 U.S. 565 (1957).

11 Listed in the order of the circuits, the most recent cases expounding the majority rule are Green v. United States, 256 F.2d 483 (1st Cir. 1958), *cert. denied*, 358 U.S. 854 (1958); United States v. Caufield, 207 F.2d 278 (7th Cir. 1953); Taylor v. United States, 229 F.2d 826 (8th Cir. 1956), *cert. denied*, 351 U.S. 986 (1956); Edwards v. United States, 286 F.2d 704 (9th Cir. 1961); Tubbs v. United States, 249 F.2d 37 (10th Cir. 1957).

12 These circuits have drawn a distinction between issues raised involving questions of fact (the indigent being entitled to counsel) and issues involving questions of law (appointment of counsel being purely discretionary): United States v. Neims, 291 F.2d 390 (4th Cir. 1961); Pruitt v. United States, 217 F.2d 648 (5th Cir. 1954), *cert. denied*, 349 U.S. 907 (1955).

13 United States v. Paglia, 190 F.2d 445 (2d Cir. 1951).

2255 proceedings are primarily civil in nature and hence do not fall within the ambit of rights granted protection to defendants in "criminal prosecutions" by the sixth amendment. Appointment of counsel is therefore properly said to be left in the discretion of the reviewing court.[14] While categorizing section 2255 proceedings as civil rather than criminal seems unrealistic, this approach was nevertheless the foundation of the rule followed by the Seventh Circuit prior to the principal case.[15]

Although the Supreme Court's attitude toward the issue is unclear, dicta in two Supreme Court cases would seem to indicate that the Supreme Court does not consider appointment of counsel mandatory in a section 2255 action. In *United States v. Hayman*[16] the Supreme Court noted that "unlike the criminal trial where the guilt of the defendant is in issue . . . a proceeding under section 2255 is an independent and collateral inquiry into the validity of the conviction."[17] The labelling of a section 2255 proceeding as an "independent and collateral inquiry" was apparently the basis of the Seventh Circuit's prior adherence to the discretionary appointment rule.[18] In addition, in *Sanders v. United States*[19] the Court, again in dictum, stated the following in discussing section 2255:

> "[W]e think it clear that the sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing. In this connection, the sentencing court *might find it useful* to appoint counsel to represent the applicant."[20]

However, in deciding the principal case the Seventh Circuit rejected the dicta in *Hayman* and *Sanders* and chose instead to be guided by its view of the implications of the recent Supreme Court decision in *Gideon v. Wainwright*.[21] *Gideon* specifically held that the fourteenth amendment requires the *states* to follow the federal rule established under the sixth amendment and to appoint counsel in criminal prosecutions unless the right is competently and intelligently waived. It is important to note that *Gideon* itself had no direct effect upon section 2255 proceedings. In dealing only with the elementary rights of *state* criminal defendants, *Gideon* did not overtly purport to modify what was already settled in federal courts.[22] In

14 For an excellent discussion of the history of § 2255 in the circuit courts, see Comment, 30 U. CHI. L. REV. 583 (1963).

15 United States v. Caufield, 207 F.2d 278 (7th Cir. 1953). The rule was reiterated in the Seventh Circuit only five months before the principal case. McCartney v. United States, 311 F.2d 475 (7th Cir. 1963).

16 342 U.S. 205 (1952).

17 *Id.* at 222.

18 McCartney v. United States, 311 F.2d 475 (7th Cir. 1963).

19 373 U.S. 1 (1963), 62 MICH. L. REV. 903 (1964).

20 373 U.S. at 21. (Emphasis added.) In *Sanders*, however, the Court also indicated that it considered § 2255 to be a "criminal collateral procedure" and not a civil procedure. *Id.* at 22.

21 372 U.S. 335 (1963).

22 The significance of *Gideon v. Wainwright* has been well recognized. See Comment, 11 LOYOLA L. REV. 288 (1963); Note, 77 HARV. L. REV. 103 (1963); Note, 39 NOTRE DAME LAW.

addition, *Sanders*, containing the dictum indicating that appointment of counsel in a section 2255 proceeding is still discretionary, was decided after *Gideon*. In fact, the Seventh Circuit even conceded that *Gideon* did not dictate the result in the principal case. The majority opinion in the principal case stated:

> "The precise holding in Gideon does not require this result. The holding there involved a state conviction, not a motion under 28 U.S.C. § 2255. We are convinced, however, that the Supreme Court's view of the right to counsel reflected in the Gideon opinion indicates the result we have reached."[23]

The important question, therefore, is why the Seventh Circuit purposely ignored the dicta in *Hayman* and *Sanders*, and instead applied the *Gideon* philosophy beyond the literal meaning indicated by the Supreme Court. The reasons, although not fully discussed by the court, seem obvious. The twentieth century American ideal of justice would seem to be sweeping enough to include as many safeguards to justice as are reasonably possible.[24] Mr. Justice Black said in *Gideon*:

> "[R]eason 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. This seems to be an obvious truth. . . ."[25]

In other words, the Seventh Circuit believes that the same safeguards made mandatory in state courts by *Gideon* should also be made mandatory in section 2255 actions. The extension of *Gideon* is the court's means to this desired end.

The principal case, therefore, shows that the repercussions of *Gideon* will probably not be limited to state court proceedings. The Seventh Circuit has implied from *Gideon* the conclusion that the mandate is applicable to any action, whether labelled criminal or civil, related to an original criminal prosecution. As Mr. Justice Sutherland once said of the indigent, "He

243 (1963); Note, 65 W. VA. L. REV. 297 (1963); 15 ALA. L. REV. 568 (1963); 49 A.B.A.J. 587 (1963); 12 DE PAUL L. REV. 306 (1963); 26 GA. B.J. 96 (1963); 47 MARQ. L. REV. 111 (1963); 37 ST. JOHN'S L. REV. 358 (1963); 32 U. CINC. L. REV. 408 (1963); 24 U. PITT. L. REV. 851 (1963).

23 Principal case at 875.

24 See Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962). In this regard *Gideon* may have raised more questions than it answered. For example, should the right to counsel be extended to an indigent at the moment of arrest, at the police interrogation, or at trial? See Beany, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771 (1961); Douglas, foreword to *The Right to Counsel: A Symposium*, 45 MINN. L. REV. 693 (1961). Should the right to counsel encompass misdemeanors as well as felonies? See Comment, 48 CALIF. L. REV. 501 (1960).

25 Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

requires the guiding hand of counsel at every step in the proceedings against him."[26]

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[26] Powell v. Alabama, 287 U.S. 45, 69 (1932).