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CONSTITUTIONAL LAW-DUE PROCESS-RIGHT TO COUNSEL IN STATE COURTS

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CONSTITUTIONAL LAW—DUE PROCESS—RIGHT TO COUNSEL IN STATE COURTS —Petitioner was tried before a jury on a charge of larceny, convicted and sentenced to a penitentiary term. He did not request counsel, and the court made no offer to appoint counsel. In the course of the trial, petitioner was prejudiced by his failure to object to certain errors in evidence. In a petition for habeas corpus in the Supreme Court of Pennsylvania, he alleged denial of a constitutional right of counsel. On answer, it was averred that in petitioner's conduct of his own defense he displayed a "familiarity with legal process in the criminal courts." A transcript of petitioner's long criminal record, including eight convictions, was attached to the answer. The state supreme court denied the writ. On certiorari to the United States Supreme Court, *held,* reversed. Whereas the due process clause of the Fourteenth Amendment does not automatically require appointment of counsel by state courts in non-capital cases, nevertheless that constitutional provision does require that the accused be given a fair trial, which in this instance necessitated an appointment of counsel. *Gibbs v. Burke,* 337 U.S. 773, 69 S.Ct. 1247 (1949).

In this country it has never been seriously questioned that one has a right to be represented by counsel in every type of case in every court if he employs his own counsel. Only when one is unable to do so in a criminal case does the question of his right to counsel become controversial. It is now well established that in every criminal proceeding in the federal courts counsel must be afforded to indigents in the absence of intelligent and competent waiver.[1] Prosecutions in state courts may involve rights to counsel under the due process clause of the Fourteenth Amendment and may also involve rights to counsel under state

[1] This rule was laid down in Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938), as an interpretation of the Sixth Amendment. The holding is now codified as Rule 44 of the Federal Rules of Criminal Procedure, 18 U.S.C. (1946) §687.

constitutions, statutes and court rules.[2] Whether or not a state court is bound by the Fourteenth Amendment to supply counsel to indigents has been made to depend in part on the gravity of the offense with which the accused is charged. In capital cases the determination has been that states must provide indigents with counsel.[3] In non-capital cases, such as the principal case, the court adheres to the rule of *Betts v. Brady*.[4] There it was held that for non-capital offenses in state courts the right to counsel under the due process clause exists only if a fair hearing is not possible otherwise. Outwardly, such a view would appear to be consistent with the analysis of Justice Cardozo in the *Palko* case.[5] That analysis denied that the Fourteenth Amendment so incorporated the Bill of Rights as to make the first eight amendments binding on the states. Justice Cardozo said that he would select as inviolate against state transgression only those rights which are the result of "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[6] Cases supplementary to *Betts v. Brady* have decided that in serious non-capital cases a fair hearing is not possible without appointment of counsel where the defendant is ignorant, youthful and inexperienced, where the trial judge is careless or misinformed, where the matter at issue is of a technical nature, or where the accused has been tricked by state officials or held incommunicado.[7] The principal case is a logical development along these lines. It takes note of the actual prejudice suffered by the petitioner in the unaided conduct of his defense. However, a minority of the Court feel that the protection afforded indigent defendants under the rule of *Betts v. Brady* is inadequate. Basing their argument in part on the assertion that the Fourteenth Amendment made the Bill of Rights binding on the states, they would grant to accused persons in state courts the same right to counsel enjoyed in federal courts. But a more compelling argument advanced by the minority justices is that even if the entire Bill of Rights is not applicable to the states, in accordance with the Palko doctrine, the right to counsel is a "fundamental principle of liberty and justice" and, therefore, satisfies the Palko test for inclusion under the Fourteenth Amendment.[8] Clearly, the ordinary layman is no match

[2] By 1931 all states had provided for the assignment of counsel to defend indigent accused persons in capital cases. National Commission on Law Observance and Enforcement, Report on Prosecution 30 (1931). "In thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in serious non-capital as well as capital criminal cases (e.g., where the crime charged is a felony, a 'penitentiary offense', an offense punishable by imprisonment for several years) be provided with counsel on request." Betts v. Brady, 316 U.S. 455 at 477, note 2, 62 S.Ct. 1252 (1942).

[3] Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932); Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363 (1945); Bute v. Illinois, 333 U.S. 640, 68 S.Ct. 763 (1948).

[4] 316 U.S. 455, 62 S.Ct. 1252 (1942).

[5] Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937).

[6] Justice Cardozo quoted Hebert v. Louisiana, 272 U.S. 312 at 316, 47 S.Ct. 103 (1926).

[7] Cases collected in 48 Col. L. Rev. 1076 (1948).

[8] The minority views are presented in Justice Black's dissenting opinions in Betts v. Brady, supra, note 2, at 474 and in Adamson v. California, 332 U.S. 46 at 68, 67 S.Ct. 1672 (1947). See also Justice Douglas' dissent is Bute v. Illinois, supra, note 3, at 677.

for a prosecutor learned in the law and skilled in trial technique.[9] The trial judge, because of the psychological pressure of impartiality, cannot take the place of defense counsel. Neither can the court carry on the pre-trial investigative function of defense counsel. Appellate review of the record cannot sufficiently penetrate the circumstances of the case to determine whether the defense was adequately presented. Furthermore, *Betts v. Brady* ignores the basic theory of the adversary system, which rests on the premise that the best method of ascertaining truth and insuring justice is to promote a competent presentation of each side of the case. Under the present rule, an indigent is faced with a greater probability of conviction by reason of his poverty. From the standpoint of the due process requirement of a "fair hearing," that fact alone should be decisive.[10]

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[9] Powell v. Alabama, supra, note 3, at 68.

[10] "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No court could be respected, or respect itself, to sit and hear such a trial." Webb v. Baird, 6 Ind. 13 at 18 (1854).