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STATUTES, ETC.

MISCELLANEOUS.

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 155.

CLARENCE EARL GIDEON

v.

H. G. COCHRAN, JR., DIRECTOR, DIVISION OF CORRECTIONS.

BRIEF FOR AMICI CURIAE.

INTEREST OF THESE AMICI CURIAE.

The undersigned Attorneys General, representing states with a wide range of historical traditions and sharp variances in their criminal procedures, join in this brief *amicus curiae* in furtherance of a commonly held objective. That objective is to insure that every indigent person accused of any felony in a state court is guaranteed right to counsel. That right, as we shall demonstrate, is indispensable to the idea of justice under law. An essential assumption of our Constitution, it transcends the power of the states to determine their own criminal procedures. Its denial in Florida, or in any other state, is ultimately of grave concern to all states throughout the nation. If its denial has up to this juncture been sanctioned by this Court's holding in *Betts* v. *Brady,* 316 U.S. 455, then we urge that that holding be reconsidered.

SUMMARY OF THE ARGUMENT.

Betts v. *Brady*, 316 U.S. 455, 462, holds that an indigent accused charged with a non-capital crime in a state court does not, as a matter of due process under the Federal Constitution, have the right to be represented by counsel, unless, upon an appraisal of all the facts of the case, the refusal of counsel constitutes "a denial of fundamental fairness, shocking to the universal sense of justice . . ."

Such a holding, at least in regard to felony cases, is at odds with the twentieth century notions of ordered liberty as it comprehends the right to counsel. It ignores the fluidity of historical concepts and fails to take account of historical growth. The language of the due process clause of the Fourteenth Amendment emphatically does not distinguish between a deprivation of life and a deprivation of liberty so long as that deprivation lacks due process; nor do the practical exigencies of the conduct of a criminal trial permit of such a distinction.

Today thirty-five states require counsel in non-capital cases, which is a strong indication of the fundamental nature of that right in the modern view. Since the Sixth Amendment compels appointment of counsel in the federal courts, the absence of a similar compulsion upon the remaining 15 states creates an ugly double standard that is incompatible with a healthy federalism.

Betts v. *Brady* means that the quality of criminal justice in the state courts is lower for the poverty stricken than for one who can afford to pay for it. Such "squalid discrimination" has now been outlawed as a matter of the denial both of due process and of equal protection, even where a fundamental constitutional right has not been involved. But, since the right to counsel for those who can afford one is a fundamental constitutional right, then *a*

fortiori that right can no longer be denied on economic grounds.

The rule of *Betts* v. *Brady* does not make it possible to conduct a trial fairly within the meaning of the advocacy system. For that system, depending as it does on presentation of all considerations on both sides of the case, demands the presence of counsel. Any trial, but particularly a criminal trial, is a highly complex, technical proceeding requiring representation by a trained legal adviser who can securely guide the accused through the maze of pitfalls into which he might otherwise stumble. The layman cannot, for instance, be expected to know procedure, whether to testify, how to cross-examine. The trial judge, who is now required to decide in advance when there will be "fundamental fairness," can never be sure when, during the trial, the need for counsel will arise. Consequently, the rule has been, and is being, inconsistently and confusingly applied, and the appellate decisions are contradictory and almost invariably marked with sharp dissents.

There will be some administrative burdens imposed upon the bench and bar if *Betts* v. *Brady* is reconsidered. But these are not insuperable. By such measures as limiting at this time the constitutional right to counsel to felonies, by requiring certification of the fact of indigence, and by making the new constitutional rule operate prospectively, the problem in respect to the courts can be contained. And by providing state subsidy of defender agencies, expanding private charitable and educational facilities for defender services, and adopting a more comprehensive and systematic approach to the problem in the bar associations, the lawyers can fulfill their obligations. Potential constitutional questions raised by the right to counsel for misdemeanors or the quality of representation are not before the Court in this case.

ARGUMENT.

I. The Holding in Betts v. Brady Runs Counter to the Historical Development of the Right to Counsel and Offends the Notion of Due Process of Our Day.

A. Due Process in the Light of the Historical Development of the Right to Counsel.

"Due process" is not a sterile and fixed conception. On the contrary, it is what Learned Hand has denominated the "mood" of our society—"that sense of moderation, of fair play, of mutual forbearance . . ." *Daniel Reeves, Inc.,* v. *Anderson,* 43 F. 2d 679-682 (1930). It is whatever from time to time is "implicit in the concept of ordered liberty" (Cardozo, J., in *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937)), "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." Frankfurter, J., in *Griffin* v. *Illinois,* 351 U.S. 12, 20-21 (1956).

The requisites of an ordered liberty are far more multifarious and complex in 1962 than they were when the Bill of Rights was enacted or the Fourteenth Amendment adopted. Examples come easily. Thus in a simpler society the term "property" could be generally limited to assets that were tangible and physical, or at least could be symbolized by something tangible or physical, such as a covenant or bond. In the twentieth century even the opportunity to engage in a possible profit-making enterprise constitutes a property within the broad compass of the due process clause. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229 (1917). Punishments that were commonplace in 1791 may well be adjudged unconstitutionally cruel and unusual today. *Trop* v. *Dulles,* 356 U.S. 86 (1958). *Weems* v. *United States,* 217 U.S. 349 (1910). The secret ballot,

unknown in the eighteenth century, is a constitutionally protected liberty in the twentieth. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 266 (1957). The right of a defendant in a criminal case to testify in his own behalf—specifically denied in the eighteenth century—is part of due process in the twentieth. *Ferguson* v. *Georgia,* 365 U.S. 570 (1961).

But the determination of the accused's constitutional right to counsel affords perhaps the most dramatic example yet of how this Court has determined due process "by the gradual and empiric process of 'inclusion and exclusion.' " The historical development of that determination needs no detailed treatment here, for, ironically, it has been spelled out fully by Mr. Justice Roberts in *Betts* v. *Brady.* There he shows how originally in England a prisoner was obliged to try his case himself rather than by counsel; how the English common law had commenced to sanction the practice of permitting the accused to have counsel; how by 1695 in treason cases and by 1836 in felony cases the accused was awarded the right by statute to be heard by counsel; and how by 1932 due process required a state to expend its funds to provide counsel to a defendant at least in capital cases. However, he was unable to conclude that these historical antecedents compel anything more than a prohibition against state rules which deny representation by counsel in criminal procedures. They did not go so far as to impose the duty upon the states to provide representation for the indigent in all serious but non-capital cases.

Betts v. *Brady,* then, determines that one hundred and seventy years of experience points to a contracting rather than an expanding meaning of the right to counsel in a democracy in the twentieth century. Two distinguished commentators long ago suggested that its historical arguments go so "dangerously and troublesomely far" as to "support the conclusion that even the Sixth Amendment

does not compel the Federal Government to provide counsel for indigent defendants in Federal prosecutions." [1]

Subsequent decisions of this Court involving indigent criminal defendants of course have persistently whittled away at this curious doctrine. Here, too, examples come easily. See *Rice* v. *Olson,* 324 U.S. 786 (1945) (ignorant Indian); *Wade* v. *Mayo,* 334 U.S. 672 (1948) (inexperienced youth); *Townsend* v. *Burke,* 334 U.S. 736 (1948) (overreaching by prosecutor and bench); *Palmer* v. *Ashe,* 342 U.S. 134 (1951) (mental defective); *Massey* v. *Moore,* 348 U.S. 105 (1954) (insane); *Moore* v. *Michigan,* 355 U.S. 155 (1957) (young Negro, insanity defense); *Cash* v. *Culver,* 358 U.S. 633 (1959) ("uneducated farm boy of 20"); *Hudson* v. *North Carolina,* 363 U.S. 697 (1960) (co-defendant's counsel withdrew); *McNeal* v. *Culver,* 365 U.S. 109 (1961) (ignorant, inexperienced Negro).

When the *Betts* v. *Brady* rule has been applied to affirm a conviction it has been done with reluctance and usually by a closely and sharply divided Court. See *Foster* v. *Illinois,* 332 U.S. 134 (1947) (5-4); *Bute* v. *Illinois,* 333 U.S. 640 (1948) (5-4); *Gryger* v. *Burke,* 334 U.S. 728 (1948) (5-4); *Quicksall* v. *Michigan,* 339 U.S. 660 (1950) (7-1).

B. The Notion of Due Process does Not Distinguish between Denial of Life and Denial of Liberty, and a Holding Based on Such a Distinction is Wrong.

Powell v. *Alabama,* 287 U.S. 45 (1932), has clearly established the principle that, in state court proceedings involving a capital offense, due process of law is inevitably denied a defendant who is without assistance of counsel, unless he has knowingly and understandingly waived his right

[1] See letter of Benjamin B. Cohen and Erwin N. Griswold, New York Times, Sunday, August 2, 1942, § IV, p. 6, cols. 5-7.

to counsel. *Betts* v. *Brady* establishes the notion that a distinction can be made between capital and non-capital cases, in that, where a non-capital case is involved, the Court will review the trial proceeding to determine if the absence of counsel did in fact result in an "unfair trial" for the defendant.

But what justification can be offered for the distinction between non-capital and capital cases in the context of a defendant's right to counsel?[2] What does "fairness of trial" have to do with the degree of punishment? This Court has said in *Powell* v. *Alabama,* 287 U.S. 45, that "the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment" (287 U.S. at 71). It said this without reference to the trial procedures and circumstances of the case, but rather indicated that absence of counsel is in essence a denial of due process. The *Betts* distinction between capital and non-capital cases constitutes a clear implication that a denial of life without due process is somehow on a different footing from denial of liberty.

1. The Language of the Fourteenth Amendment is Plain.

The Fourteenth Amendment, however, makes no such distinction. Its definition of "due process" is not varied or qualified by whether it was life or liberty of which a defendant has been deprived. When it is applied, one looks to see (1) if there has been a deprivation of life, liberty

[2] Certainly no justification in the context of the accused's status. Thus *Kinsella* v. *Singleton,* 361 U.S. 234 (1959), holds that no constitutional distinction could be drawn between capital and non-capital offenses in determining that a civilian cannot be tried in peace time by a court-martial.

or property, and (2) if that deprivation was accompanied by due process. These are the two separate factors or criteria in this part of the Amendment. Life and liberty stand on the same footing and belong in the same category. In the effort to determine whether there has been a denial of due process in a particular case, a determination of whether it was life or whether it was liberty which was deprived is irrelevant under the words of the Amendment.

2. The Distinction does Not Practicably Exist.

An exhaustive study of the various practices throughout the United States of furnishing legal representation in the criminal courts to those who cannot afford a lawyer was recently undertaken by the Association of the Bar of the City of New York and The National Legal Aid and Defender Association. The conclusion of that report included the statement that "The Special Committee to study defender systems is convinced that justice cannot be equal and accessible for all unless every defendant brought into criminal courts is represented by counsel." [3]

This conclusion admits of no distinction between capital and non-capital cases and shows one of the basic reasons for this Court's holding that due process of law was absent in *Powell* v. *Alabama.* The Court there said: "Even the intelligent and educated layman has small and sometimes no skill in the science of law." 287 U.S. at 69. Mr. Justice Douglas has observed in his dissenting opinion in *Bute* v. *Illinois,* 333 U.S. 640, 677 (1948): "But to draw the line between this case [entailing the possibility of twenty years'

[3] Equal Justice for the Accused, Doubleday & Co., Inc., Garden City, N.Y. (1959), a report by The Special Committee of the Association of the Bar of the City of New York and The National Legal Aid Association.

imprisonment] and cases where the maximum penalty is death is to make a distinction which makes no sense in terms of the absence or presence of *need* for counsel." 333 U.S. at 682. As the eminent authority on criminal law, Professor Francis Allen, has pointed out—

> "If the rights of counsel are deemed an inherent part of the concept of 'fair hearing,' as has been consistently asserted by the Court since the Powell case, the crucial inquiry would seem to be, not so much the penalties imposed on the defendant upon conviction, but the *need* for skilled representation in the proceedings directed to the establishment of guilt. There is little basis for the belief that trials of capital cases, in general, produce greater need than trials of several other categories of serious, non-capital felonies. Most experienced defense lawyers would probably testify that a murder prosecution, which may result in imposition of the death penalty, is not by any means ordinarily the case most difficult to defend. Indictments charging the accused with such crimes as embezzlement, confidence game, or conspiracy, are likely to place the unrepresented defendant in a far more helpless position. The rule, therefore, seems vulnerable to fundamental criticism." Allen, The Supreme Court, Federalism, and Criminal Justice, 8 DePaul L. Rev. 211, 230 (1959).

C. Due Process in the Light of State Practices to Date.

Conceiving due process as an evolutionary concept subject to the changing influences of society, this Court has indicated that it is valid to inquire into the laws and to examine the procedures of the several states as a step in deciding the factors of due process which ought to be im-

posed today upon the states. Such inquiries were made and were fundamental to the holdings of *Powell* v. *Alabama,* 287 U.S. 45, 73 (1932); *Wolf* v. *Colorado,* 338 U.S. 25, at 33-39 (1949); *Elkins* v. *United States,* 364 U.S. 206, at 224-232 (1960); and *Mapp* v. *Ohio,* 367 U.S. 643 (1961), at 651, 652. See also *Crooker* v. *California,* 357 U.S. 433, 448 (1958).

Most recently this was done in *McNeal* v. *Culver,* 365 U.S. 109, 121 (1961). In the appendix to his opinion Justice Douglas tabulated the states as to their requirements in the context of assigned counsel. That appendix is still accurate and reveals that thirty-five states now require the appointment of counsel in non-capital cases. Such a solid majority of the states, in endorsement of the non-capital assigned counsel principle, indicates that the principle is indeed a fundamental part of the concept of due process of law.

As Justice Sutherland said, in noting that every state in the Union requires appointment of counsel in capital cases, in *Powell* v. *Alabama:* "A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right." 287 U.S. at 73. The argument as to the fundamental and inherent nature of the right to assigned counsel in felony cases accords precisely with the reasoning accepted by the Court in *Powell* v. *Alabama.* And though the current tabulation reveals less than unanimity among the states, it is certainly a stronger indication of the modern view of due process in the right-to-counsel context than was the practice of the states in excluding illegally obtained evidence in the searches-and-seizures context. See *Mapp* v. *Ohio, supra.*

D. A Double Standard is Created between the Federal and the State Courts.

The constitutional right to counsel for the indigent accused in the federal courts is sternly commanded and unequivocally provided for:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or *liberty.*" (Emphasis supplied.) *Johnson* v. *Zerbst,* 304 U.S. 458, 467 (1938).

> "If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus.*" 304 U.S. at 468.

> "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." (Emphasis supplied.) Rule 44, Federal Rules of Criminal Procedure.

Now, as state entities ourselves, nobody could be more committed to the proposition that "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." *Elkins* v. *United States,* 364 U.S. 206, at 221 (1960). This Court, both in *Elkins* v. *United States* and in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), thoroughly considered the double standard that exists when state practices do not measure up to the

federal requirements. Although these two cases dealt with problems of crime solution, their teaching in respect to the "hazardous uncertainties of our heretofore ambivalent approach" (*Mapp* v. *Ohio,* at 658) is applicable to the problem of counsel for the indigent accused. It is enough that it is we states, not the federal establishment, who must presently smart under Anatole France's lash: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread" (quoted by Justice Frankfurter in *Griffin* v. *Illinois,* 351 U.S. 12, 23 (1956)). Somehow there is something doubly ignoble about subjecting an accused to the danger of conviction for lack of ability to hire counsel in the state court when, perhaps across the street in a different courthouse, he would be entitled to this protection as a fundamental right under the Sixth Amendment.

II. The Holding in Betts v. Brady Makes the Quality of Criminal Justice Dependent upon the Accused's Capacity to Pay for It.

A. Griffin v. Illinois and Burns v. Ohio Are Conclusive of the Point.

"There can be," this Court has said, "no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois,* 351 U.S. 12, at 19 (1956). So firm is the attachment of the undersigned states to that principle that we could confidently rest our case on that assertion alone.

For the Constitution now requires that, where a state, in non-capital criminal matters, gives a right to those defendants who are able to afford the costs preliminary to an exercise of that right, the state must likewise provide accessibility to the right to defendants not able to afford the preliminary prerequisites. *Griffin* v. *Illinois,*

supra, and *Burns* v. *Ohio,* 360 U.S. 252 (1959). Said the main opinion in *Griffin* v. *Illinois:*

> "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' . . . *In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.*" (Emphasis supplied.) 351 U.S. at 17.

Concurring with this sentiment, Justice Frankfurter said in his separate opinion: "The State is not free to produce such a squalid discrimination." 351 U.S. at 24.

The significant thing here is that the right of appeal is not *per se* constitutionally required by the due process clause. Indeed, *Griffin* v. *Illinois* explicitly states otherwise. 351 U.S. at 18 and 21. Yet that right cannot be made to depend upon the accused's financial ability to pay for it. On the other hand, the right to counsel for those who can afford one *does* come within the compass of the due process clause. *Chandler* v. *Fretag,* 348 U.S. 3 (1954). Clearly, if the loss on account of poverty of a right not constitutionally protected now constitutes a denial of equal protection, *a fortiori* the loss of a right that *is* constitutionally protected is such a denial.

III. The Rule of Betts v. Brady is Inherently Unworkable by a Trial Court in an Adversary System and Incapable of Consistent Application by Appellate Courts.

A. The Rule is Inherently Unworkable by a Trial Court.

The adversary system is one of the glories of Anglo-American jurisprudence, but it rests on the presupposition

that competent advocates will fully bring forth all considerations on each side of the case. If the old maxim, "He who represents himself in litigation has a fool for a client," retains any meaning, it is most poignantly applicable in a criminal proceeding, where one's very liberty is at stake.[4] A lawyer long acquainted with the indigent defendant problem has written that to try a criminal defendant without counsel is to place him *ipso facto* in a position of prejudice and "is to abandon the adversary system." His arguments are unanswerable:

> "I have witnessed the agonizing scene in which an unrepresented defendant is asked by the court or the district attorney if he wishes to cross-examine a witness for the prosecution. Instead of asking a question of the witness in the proper form, the accused, startled and confused, makes a statement contradicting the testimony of the prosecuting witness . . . This . . . brings forth sharp official rebuke which quickly ends the defendant's abortive attempt at cross-examination.
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> "I have heard a judge presiding over the trial of a criminal case inadvertently misquote the governing law to the serious detriment of the unrepresented defendant. And I have observed the district attorney preoccupied with the next case, remain silent while an excessive and illegal sentence was imposed on the uncounselled defendant whose interest he had said earlier in the proceeding he would protect . . . The Judge usually spends only a small portion of his time in criminal court and cannot be expected to be fully informed on the law of the immediate case. The district at-

[4] "Thus, the defendant without counsel is unable to avail himself of the benefits of the adversary system, and the premise upon which that system rests is impaired." Equal Justice for the Accused, Doubleday & Co., Inc., Garden City, N.Y. (1959), p. 37.

> torney, conditioned by his official experience to view a criminal case from the standpoint of the prosecution, is not apt to think in terms of *moves, defenses and laws favorable to the defense.* [Emphasis supplied.]
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> ". . . The uncounselled defendant . . . cannot be advised properly by the district attorney or the court on the crucial questions of plea or as to whether to submit his case to a jury or to a judge . . . , and he cannot during the progress of a trial confer and consult privately with the district attorney or the court.
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> "The need for a lawyer at the sentencing of a defendant who pleads guilty or is found guilty may be even greater than the need at arraignment or trial . . . the sentencing structure is complicated and not easily understood even by lawyers. Pollock, "Equal Justice in Practice," 45 Minn. L. Rev. 737 (1961).

Any trial is a complex and specialized business, but a criminal trial can be particularly fearful. As far back as 1825 William Rawle, himself a former federal prosecutor, observed that—

> "[T]he most innocent man, pressed by the awful solemnities of a public accusation and trial, may be incapable of supporting his own cause. He may be utterly unfit to cross-examine the witnesses against him, to point out the defects of their testimony, and to counteract it by properly introducing and applying his own. Hence the importance, we might say, the right, of having the aid of men educated and accustomed to manage criminal trials, to whose knowledge and skill he may safely commit the conduct of his defense." Rawle, A View of the Constitution of the United States of America, H. C. Carney & I. Lea, Philadelphia (1825).

How to plead and testify at arraignment,[5] motions for specifications, examination of prospective jurors on *voir dire,* whether to take the stand in one's behalf, how to establish alibis or run down other leads that the testimony may turn up, the interposition of objections, the scope of cross-examination, the submission of proposed instructions to the jury, objections to instructions that were given, establishing the validity of the sentence, whether and how to claim an appeal—one could go on for many pages. As was said by this Court in *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932), "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law." Layman, indeed—many an experienced lawyer—will quite frankly concede his incapacity to cope with the exigencies of a criminal trial. The special difficulties of a Florida jury trial have been recently spelled out at length by Mr. Justice Douglas in his concurring opinion in *Carnley* v. *Cochran,* 369 U.S. 506, 524 (1962), 82 S. Ct. 884, 892 (1962), who then went on to say:

> "Intricate procedural rules are not restricted to criminal trials in Florida. Similar rules, equally as complex and confusing to the layman, may be found in the criminal statutes of the other States. . . . the rule of *Betts* v. *Brady* projected in a jury trial faces a layman with a labyrinth he can never understand nor negotiate.

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[5] We assume that, except perhaps in the circumstances of *Crooker* v. *California,* 357 U.S. 433 (1958) (that defendant was an intelligent thirty-one-year-old college graduate with one year of law school training), the constitutional right to representation includes representation at the arraignment. See *Hamilton* v. *Alabama,* 368 U.S. 52 (1961).

> "As a result, the jury system—pride of the English-speaking world—becomes a trap for the layman because he is utterly without ability to make it serve the ends of justice."

It is, of course, true that in the past, under the *Betts* v. *Brady* "shocking to the universal sense of justice" standard, some accused who have fallen into one or more such pitfalls have been rescued when this or some lower tribunal has looked back to see if injustice in fact resulted; *e.g., United States ex rel. Savini* v. *Jackson*, 250 F. 2d 349 (2d Cir. 1957) (rape case in which the appellate court said the charge was too complex for waiver of counsel by guilty plea). Recently, moreover, there has been a condition for imposition of the standard recently decided by this Court which seems to go a long way towards further rescue. That is the requirement in *Cash* v. *Culver*, 358 U.S. 633, 637 (1959), that counsel is required if injustice is "apt to result." This means that the *Betts* v. *Brady* test must now be applied through the perspective of the trial judge, not the reviewing appellate judge.

But it is difficult to comprehend how, as a practical matter, a trial judge can do this with the degree of consistency presupposed by a judicial determination placing the onus of such decisions upon him. In the first place, in a felony case it is highly unlikely that there is one trial judge as such: different judges may preside at the arraignment, at the grand jury session, possibly at pre-trial motions, if any, and at the trial itself. How can the judge in the arraignment session anticipate what is to come up in trial? How is the trial judge to know what crucial matters transpired at the arraignment which thenceforth require counsel? If the proof of an alibi in improper formulation of questions is extremely difficult to establish, or if the accused gets

enmeshed in seeking to examine or cross-examine, is the judge expected to stay proceedings in order to bring in defense counsel? Suppose the trial proceeds without incident until the sentencing stage, at which point complicated problems of law arise: will counsel at that time be ordered in? Take *Hudson* v. *North Carolina,* 363 U.S. 697 (1960). Could the trial judge there possibly have anticipated that the defendant with counsel would plead guilty in mid-trial and thereby prejudice his remaining co-defendants? and that the counsel would thereupon withdraw from the case as the result of its disposition, and thereby deprive the remaining co-defendants of the advice that he had promised to offer gratuitously, coincident with the defense of his own client?

To pose such questions is to provide the answer. Obviously there can be no semblance of uniformity in the conduct of such proceedings, for the very matter which will shock the conscience of one judge will fail to penetrate the repose of another. As we have indicated, even before *Cash* v. *Culver,* the judges of the highest court of this land have often divided 5 to 4 on whether an indigent accused's possible trial was a "denial of fundamental fairness." It is now most unrealistic to expect that the trial judges, looking ahead, can accomplish that which has obviously been so disturbing to this Court from the vantage point of looking back.

But, it will be asserted, the trial judge will outdo himself to see that the unrepresented accused is protected. We assume, with Mr. Justice Douglas in *Carnley* v. *Cochran,* 369 U.S. 506 (1962), 82 S. Ct. 884, 894 (1962), that criminal rules might not be applied by a judge "with the same vigor against a layman defending himself as they would against one represented by a lawyer." On the other hand, they might. In any event, to impose this obligation on any judge is, again, to negate the meaning of the adversary tradition.

Mr. Justice Butler a generation ago put it perhaps as well as anyone:

> "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." *Powell* v. *Alabama,* 287 U.S. 45, 61 (1932).

B. The Rule is Incapable of Consistent Application by Appellate Courts.

The twenty years' accumulation of confusion and contradictions in the reviewing courts' decisions under *Betts* v. *Brady* amply demonstrates how utterly has "shocking to the universal sense of justice" failed as a beacon to guide trial judges. An exhaustive catalogue of these decisions is not necessary here, because Mr. Justice Black has provided one in his concurring opinion in *Carnley* v. *Cochran, supra,* pp. 891-892. A comparison of three pairs of cases cited in the concurring opinion will illustrate the inconsistencies which have come about as a result of the application of the *Betts* v. *Brady* standard:

> (1) *Flausburg* v. *Kaiser,* 55 F. Supp. 959 (W.D. Mo. 1944), aff'd on other grounds, 144 F. 2d 917 (8th Cir. 1944) (capital crime in which counsel was not appointed).
>
> *Powell* v. *Alabama,* 287 U.S. 45 (1932) (capital crime in which counsel was appointed).

(2) *Parker* v. *Ellis,* 258 F. 2d 937 (5th Cir. 1958) (forgery case in which defendant said he was too sick to defend himself—counsel denied).

Massey v. *Moore,* 348 U.S. 105 (1954) (defendant insane—counsel appointed).

(3) *Henderson* v. *Bannan,* 256 F. 2d 363 (6th Cir. 1958) (rape case in which appellate court said defendant had competently waived counsel by his guilty plea).

United States ex rel Savini v. *Jackson,* 250 F. 2d 349 (2d Cir. 1957) (rape case in which appellate court said charge was too complex for waiver of counsel by guilty plea).

Although each set of cases contained within itself substantially similar fact situations, the right to appointed counsel was denied in the first case of each pair, but upheld in the second—clearly a consequence of the vague standard of "denial of fundamental fairness" which *Betts* has advanced.

Moreover, all defendants convicted without representation cannot possibly obtain appellate review, or, if they do, there is no assurance that the record will be adequate for review. For transcripts are unavailable, witnesses have disappeared, memories have failed. In any case the results here, too, are uneven.[6]

[6] For example, in the Commonwealth of Massachusetts the mandatory requirement for stenographers in felony cases was provided only seven years ago. G.L. c. 278, § 33A, as amended by chapter 352 of St. 1955. Cf. *Palmer* v. *Ashe,* 342 U.S. 134 (1951), where a seemingly dull-witted defendant without counsel successfully challenged his conviction in a habeas corpus proceeding commenced eighteen years after.

IV. The Burden Imposed upon the Courts and Bar by Reconsideration of Betts v. Brady is Manageable.

A. The Burden on the Courts.

We repeat that we are limiting our claim to the constitutional right to representation for felonies. *Gideon* v. *Cochran* is a felony case, and the question of the right to obtain counsel in misdemeanors is not before this Court. Concededly the question of the right to obtain counsel in misdemeanor cases might be foreseen as the troublesome next step, not that it follows that misdemeanor cases are likely to reach this Court. See Note, 48 Calif. L. Rev. 501 (1960). As of this time, in any event, the experience of the states justifies the restriction of the right to serious charges. See *Gholson* v. *Commonwealth,* 308 Ky. 82, 212 S.W. 2d 537 (1948); Note, 38 Ky. L.J. 316 (1950). Also the question of adequacy of representation will some day present a problem to this Court. A former United States Attorney General has asserted that "voluntary acceptance of assignments as defense counsel, without compensation, is as outmoded as a volunteer fire department in modern society." Herbert Brownell, Jr., "The Bill of Rights," 41 Am. Bar Assn. Journal, 517, 521 (1955). And representation alone does not solve the problems of the indigent accused, for there may be other vital expenses, such as the travelling expenses, daily fees and subsistence of witnesses. And, as for expert witnesses, one of our most perceptive judges once wrote:

> "[A] man may be jailed for life, or even electrocuted, because he hasn't the money to discover a missing document necessary to win his case or to employ a competent hand-writing expert or psychiatrist. This is not democratic justice. It makes a farce of 'equality before the law,' one of the first principles of a democ-

racy." Jerome N. Frank, "Today's Problems in the Problem of Criminal Justice," 15 Fed. Rules 101, 103 (1953).

Manifestly a determination by this Court that the Constitution requires representation in felony cases poses difficult problems about those now serving sentences in which the right to counsel was not recognized. As to this problem, two alternative courses seem to be open. First, of course, this Court or the state courts might proceed on the assumption that, since the constitutional requirements have become clear, all persons are entitled to be heard on the issue of whether the process by which they were convicted satisfied the standards now established. Doubtless it will appear that some defendants now in prison with relatively long sentences still to serve are entitled to new trials. We are aware that after *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), the federal courts in certain districts were confronted by a very large number of petitions for *habeas corpus*. Though the responsibility to consider these petitions and in some cases to retry old charges was onerous, the courts managed to dispose of them, convinced, evidently, that it was wiser to make the new constitutional guaranty fully effective than to protect themselves from a flood of cases. See Beaney, "The Right to Counsel in American Courts, Wm. Merritt, Ann Arbor, U. of Mich. Press (1955). The number of cases in which new trials must be ordered will be significantly reduced, however, if due regard is given to the principle of waiver and to the requirement that the convict must show that he was unable to afford counsel of his own choosing.

There is another alternative, which in many ways seems more desirable. That is for this Court to determine that, since the standards which it establishes are dependent, not

upon the specific intention of the framers of the Constitution, but upon the lessons of experience, it is appropriate not to give those standards retroactive effect. Mr. Justice Frankfurter indicated that such a judicial limitation on the effect of new constitutional doctrine is permissible, and perhaps desirable, in *Griffin* v. *Illinois,* 351 U.S. 12, 25-26 (1958). The solution suggested by Mr. Justice Frankfurter, though it was rejected by the Illinois Court in the *Griffin* case itself (*People* v. *Griffin,* 137 N.E. (2d) 485), has been acted upon in similar circumstances by many courts. See, *e.g., Durham* v. *United States,* 214 F. 2d 862, 874; Note, 60 Harvard Law Rev. 437. See also Comment, "Prospective Overruling and Retroactive Application in the Federal Courts," 71 Yale L.J. 907 (1962).

With respect to the matter of future prosecutions, the problem is entirely manageable. By the exercise of the rule-making powers of the courts, they will be enabled to find adequate and fair means of solving the problem of representation.

B. The Burden on the Bar.

The effect of obligatory representation in felony cases will concededly impose a difficult but not insurmountable burden on the bar. The Legislatures in many states will have to act to set up an office of the public defender or its equivalent.[7] If so, it will not be the first time legislative

[7] In Massachusetts, in 1958, after consideration of two cases involving the right of indigent defendants to representation in a felony case, the Supreme Judicial Court, under its rule-making powers, issued General Rule 10, requiring representation in all felony cases tried in the Superior Court. This was followed in 1960 by the enactment of G.L. c. 221, § 34D, establishing the Massachusetts Defenders Committee, a state agency.

action has become a necessary consequence of a decision of the Court. Consider the legislative aftermath of *Baker* v. *Carr,* 369 U.S. 186 (1962).

The English solution suggests one way of coping with the problem. In that country indigents have been allowed to select counsel from a list of attorneys who have agreed to serve and who receive compensation from the government for the services they render. Legal Aid and Advice Act, 12 & 13 Geo. 6, c. 51.

The State, City and County Bar Associations in many instances will have to bestir themselves. A vast expansion of the services of charitable organizations such as Legal Aid seems plainly indicated. Law schools of the nation can prove of immense help.[8] The interstices will have to be taken up by voluntary assignment and court appointment.[9]

CONCLUSION.

Betts v. *Brady,* already an anachronism when handed down, has spawned twenty years of bad law. That in the world of today a man may be condemned to penal servitude for lack of means to supply counsel for his defense is unthinkable. We respectfully urge that the conviction below be reversed, that *Betts* v. *Brady* be reconsidered, and that this Court require that all persons tried for a felony in a

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[8] See, for example, Massachusetts Supreme Judicial Court General Rule 11 providing for representation of indigents in lower courts by supervised senior students of accredited law schools.

[9] The present scope of these amelioratives is described in Equal Justice for the Accused, Doubleday & Co., Inc., Garden City, New York (1959).

state court shall have the right to counsel as a matter of due process of law and of equal protection of the laws.

Respectfully submitted,

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