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Constitutional Law - Due Process - Right to Counsel

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driver who does so transforms his automobile into a dangerous undirected mechanism. Realistically no circumstances or excuses should justify such conduct when one considers the duty of care imposed upon every driver. When one is under a duty to use care not to injure another, he cannot fulfill that duty by falling asleep. The above stated rule acts as a much greater deterent force and allows the aggrieved parties a sounder remedy.[13] Therefore such conduct should not be excusable.

Although there is no North Dakota case law exactly in point, it is submitted that the courts of this state should follow the view expressed in the instant case.

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CONSTITUTIONAL LAW—DUE PROCESS—RIGHT TO COUNSEL —Petitioner was charged in a Flordia state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. The court denied petitioner's request for a court-appointed counsel. Being without funds he was forced to conduct his own defense. He was found guilty and sentenced to five years in the state prison. On the grounds that the court's refusal to appoint him counsel denied him constitutional rights, the petitioner filed for a writ of habeas corpus in the Florida Supreme Court. All relief was denied. The United States Supreme Court granted certiorari, and the judgment was reversed and the cause remanded to the Supreme Court of Florida. *Gideon v. Wainwright*, 83 Sup. Ct. 792 (1963).

At common law a person charged with treason or a felony had no right to counsel; in fact, counsel was not allowed for such crimes. Strange as it may seem, counsel was allowed, indeed, even required in most misdemeanor cases.[1] In this country twelve of the original thirteen colonies guaranteed the right to counsel either in their constitu-

13. Once the plaintiff has proven that the driver fell asleep, the driver cannot excuse or justify his conduct.

1. I STEPHAN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 341 (1883); I ARCHBOLD'S CRIMINAL PRACTICE AND PLEADING 54 (8th ed. 1880).

tions or by statute.[2] With the exception of two of these colonies, the right to counsel meant only the right of the accused to retain a counsel of his own choice in cases of capital offenses; not the right to have counsel appointed by the court.[3]

Upon the ratification of the Federal Bill of Rights in 1791, the right to counsel in "all criminal prosecutions" became a part of our Federal Constitution.[4] The first important judicial interpretation of this clause of the Sixth Amendment was made in 1938.[5] Justice Black in *Johnson v. Zerbst* designated the right to counsel as "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty."[6] Yet, due to earlier decisions,[7] these "fundamental human rights" were to apply only to the federal courts, and not to the state courts.

Nevertheless, six years prior to the *Zerbst* decision, the United States Supreme Court in *Powell v. Alabama*,[8] stated that the right to counsel is of "fundamental character" and as such " . . . is embraced within the due process clause of the Fourteenth Amendment."[9] Thus, it was unnecessary to rely upon either state law or the Sixth Amendment to guarantee the right to counsel in a state capital case. The Court, ten years later, in *Betts v. Brady*,[10] specifically stated that "the due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment. . . ." It was held that only when the special circumstances[11] of the particular cases operated

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2. Betts v. Brady, 316 U.S. 455, 467 (1942); Powell v. Alabama, 287 U.S. 45, 64 (1932).
3. BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS. 21 (1955).
4. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and **to have the assistance of counsel for his defense.**" U.S. Const. amend. VI (emphasis added).
5. Johnson v. Zerbst, 304 U.S. 458 (1938).
6. **Id.**, 462.
7. Barron v. Baltimore, 32 U.S. 243 (1833); Hurtado v. California, 110 U.S. 516 (1884).
8. 287 U.S. 45 (1932), where previously a state court refused to appoint effective counsel in a capital case.
9. **Id.**, 67.
10. 316 U.S. 455, 461, 462 (1942).
11. In Cash v. Culver, 258 U.S. 633, 637 (1959), quoting in part Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948) the Court stated: " 'Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the

to deprive an accused of due process of law guaranteed by the Fourteenth Amendment that the accused had his constitutional rights infringed.[12] This "special circumstance" test has since been applied in varying degrees by the courts.[13]

Justice Black dissented vigorously in the *Betts* case,[14] maintaining that the Fourteenth Amendment made the Sixth applicable to the states, and has since held firm to this contention.[15] His majority opinion in *Gideon v. Wainwright*[16] expressly overrules the *Betts* decision. The Court in that case " . . . made an abrupt break with its own well-considered precedents."[17] Although Justice Black does not expressly say that this case incorporates the Sixth Amendment, he implies this by comparing the right to counsel with other fundamental principles of liberty expressly contained in the Bill of Rights which are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.[18]

What is to be the effect of *Gideon v. Wainwright?* Will it " . . . furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land"?[19] Will it require state courts to provide an accused with counsel in *all* criminal prosecutions? Justice Harlan, in his concurring opinion proposes that the special circumstances rule should be " . . . abandoned in noncapital cases, at least as to offenses . . . of a substantial prison sentence."[20] It seems

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complicated nature of the offenses charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair'; the Constitution requires that the accused must have legal assistance at his trial."

12. Betts v. Brady, 316 U.S. 455 (1942).

13. Carnley v. Cochran, 369 U.S. 506 (1962); Hudson v. North Carolina, 363 U.S. 697 (1960); Crooker v. California, 357 U.S. 433 (1958); Cicenia v. La Gay, 357 U.S. 504 (1957); Moore v. Michigan, 355 U.S. 155 (1957).

14. Betts v. Brady, 316 U.S. 455, 474 (1942).

15. Carnley v. Cochran, 369 U.S. 506, 518 (1962) (dissenting opinion); Bute v. Illinois, 333 U.S. 640, 677 (1947) (dissenting opinion); Foster v. Illinois, 332 U.S. 134, 140 (1946) (dissenting opinion.).

16. 83 Sup. Ct. 792 (1963).

17. **Id.,** 796, Justice Black felt that the Powell v. Alabama case ". . .unequivocally declared that 'the right to the aid of counsel is of . . . fundamental character' ".

18. **E.g.,** Gitlow v. New York, 268 U.S. 652 (1925) (speech and press); Cantwell v. Connecticut, 310 U.S. 296 (1940) (religion); De Jonge v. Oregon, 299 U.S. 353 (1937) (assembly); Louisiana **ex rel.** Gremillion v. NAACP, 366 U.S. 293 (1961) (association); Edwards v. South Carolina, 372 U.S. 229 (1963) (speech, assembly, petition for redress of grievances); Smyth v. Ames, 169 U.S. 466 (1898) (eminent domain); Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment).

19. Foster v. Illinois, 332 U.S. 134, 139 (1946).

20. Gideon v. Wainwright, 83 Sup. Ct. 792, 801 (1963) (concurring opinion). He also stated, "Whether the rule should extend to all criminal cases need not now be decided."

to have been the intention of the Court in this case to remove any discrepancies between state and federal court procedural rights to counsel, as was done regarding illegal search and seizure in *Mapp v. Ohio*.[21] What the minimum charges shall be to warrant this "right to counsel" must await future litigation.[22]

GENE LEBRUN

CRIMINAL LAW—ALIBI—AFFIRMATIVE DEFENSE IN IOWA—The defendant was indicted for second degree murder. Under Iowa's disclosure statute[1] defendant gave notice of his intention to plead alibi. On appeal, the Iowa Supreme Court *held*, three judges dissenting, that the trial court properly instructed the jury that the defendant was under a burden to establish his alibi by a preponderance of the evidence; yet, if the evidence as a whole left a reasonable doubt of guilt, the jury must acquit. The dissent argued that this instruction was contradictory, and that it denied the defendant his presumption of innocence by making him prove his non-presence. *State v. Stump*, 119 N. W. 2d 210 (Iowa 1963).

Iowa's stringent alibi rules have been severly criticized,[2] even though the state claims all the common safeguards of "reasonable doubt" in its criminal prosecutions.[3] If the accused pleads not guilty, he denies that he participated in the commission of the crime, and he need only raise a reasonable doubt of this fact.[4] But if he goes further and says that he was so far away that he could not possibly have committed the crime, he must prove it by a preponderance of the evidence,[5] in order to be acquitted on that ground

21. 367 U.S. 643 (1961).
22. In another recent decision, Douglas v. People of State of California, 83 Sup. Ct. 814 (1963), the United States Supreme Court held that an indigent defenant charged and convicted of a felony had a right to a court-appointed counsel for an appeal.

1. Iowa Code Ann., tit. 36, § 777.18 (1962). "Where the defendant pleads not guilty and proposes to show insanity as a defense, or that he relies on an alibi or that he was at some other place at the time of the alleged commission of the offense charged, he shall, at the time he pleads or at any time thereafter, not later than four days before the trial, file a written notice of this purpose. . . ." See State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953).
2. See State v. Reed, 62 Iowa 40, 17 N.W. 150 (1883); State v. Hamilton, 57 Iowa 596, 11 N.W. 5 (1881). See also 27 Mich. L. Rev. 702 (1929).
3. State v. Red, 207 Iowa 69, 151 N.W. 831, 832 (1880).
4. State v. Bosworth, 170 Iowa 329, 151 N.W. 581, 586 (1915).
5. **Ibid.**