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IN THE

Supreme Court of the United States

October Term, 1962

No. 155

CLARENCE EARL GIDEON, *Petitioner,*

v.

H. G. COCHRAN, JR., Director,
Division of Corrections, *Respondent.*

On Writ of Certiorari to the Supreme Court of The State of Florida

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BRIEF FOR THE PETITIONER

SUMMARY STATEMENT OF THE CASE

Petitioner, Clarence Earl Gideon, was charged by an information filed in the Circuit Court of Bay County, Florida, with a felony defined as "unlawfully and feloniously break[ing] and enter[ing] a building of another, to wit, The Bay Harbor Poolroom . . . with intent to commit a misdemeanor within said building, to

wit, petit larceny . . .'' (R. 1). This offense is punishable under Florida law by a sentence of not more than five years imprisonment or a fine not to exceed $500. Fla. Stat. §810.05 (1961), Appendix A, *infra*. Petitioner pleaded not guilty (R. 3).[1]

At the commencement of the trial, Petitioner informed the trial judge that he was ''not ready'' because ''I have no counsel.'' (R. 8-9). Petitioner expressly requested that counsel be appointed to assist him at the trial, but the request was denied by the trial court. The colloquy is as follows (R. 9):

> ''The Defendant: Your Honor, I said: I request this Court to appoint Counsel to represent me in this trial.[2]
>
> ''The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a

[1] The record shows that the arraignment was postponed when Petitioner ''requested permission to consult counsel'' (R. 2). The record does not indicate, however, whether Petitioner obtained legal assistance at that point in the proceeding.

[2] It is conceded that Petitioner was an indigent person without funds to employ an attorney. In a memorandum filed in this Court in connection with a motion to strike portions of the record designated for printing, Respondent stated as follows:

> ''Respondent hereby admits and concedes, for purposes of this case, that all allegations in the habeas corpus petition are true, including petitioner's allegations that he was without funds and without an attorney at the time of trial and that the trial court failed to appoint counsel upon his request.'' (*Respondent's Motion to Strike Paragraphs 1 and 2 of Petitioner's Designation for Printing, p. 2*).

> capital offense.[3] I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.
>
> "The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.
>
> "The Court: (Addressing the Reporter) Let the record show that the Defendant has asked the Court to appoint Counsel to represent him in this trial and the Court denied the request, and informed the Defendant that the only time the Court could appoint Counsel to represent a Defendant was in cases where the Defendant was charged with a capital offense. The Defendant stated to the Court that the United States Supreme Court said he was entitled to it."

A jury of six persons was then impaneled and the case proceeded to trial. Gideon represented himself. He directly examined several witnesses called in his behalf; he cross-examined the state's witnesses; and he made a closing argument. He was found guilty by the jury (R. 4). On August 25, 1961, Gideon was sentenced to five years imprisonment, the maximum penalty under the applicable statute (R. 5). He is presently confined in the state penitentiary at Raiford, Florida (R. 45).

On October 11, 1961, Gideon filed a sworn, handwritten petition for a writ of habeas corpus in the Florida Supreme Court, alleging that he "was without

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[3] See *Johnson* v. *Mayo,* 158 Fla. 264, 28 So. 2d 585 (1946), *cert. denied,* 329 U.S. 804 (1947); *Sneed* v. *Mayo,* 66 So. 2d 865, 872 (1953), *habeas corpus proceeding dismissed,* 69 So. 2d 653 (Fla. 1954); Fla. Stats. § 909.21 (1961), Appendix A, *infra.* But see note 27, *infra.*

funds and without an attorney," that he had asked the trial court "to appoint me an attorney but they denied me that right" and "ignored this plea," and that this action by the trial court denied him "the rights of the 4th, 5th and 14th Amendments of the Bill of Rights" (R. 45-46). The petition did not recite any "special circumstances" to show that the trial was unfair in the absence of counsel, nor did Petitioner allege that he was unable to defend himself by reason of any special circumstances or conditions. Gideon alleged that, under decisions of this Court, "the State of Florida should see that everyone who is tried for a felony charge should have legal counsel" (R. 46).

The Clerk of the Florida Supreme Court has certified to this Court that "no pleadings, transcripts, documents or papers" were before that Court other than the handwritten petition for habeas corpus which Gideon transmitted to the Florida Supreme Court from the state penitentiary.[4] The petition in this Court, like that in the Supreme Court of Florida, is based upon a claim of right to counsel. It does not allege any "special circumstances" in the present case requiring the appointment of counsel.

The petition for habeas corpus was denied by the Florida Supreme Court without requiring a return, without a hearing, and without opinion (R. 47).[5]

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[4] Certificate of Guyte P. McCord, Clerk, Supreme Court of Florida, attached to *Respondent's Motion to Strike Paragraphs 1 and 2 of Petitioner's Designation for Printing.*

[5] Similar procedure was followed by the Florida Supreme Court in *Reynolds* v. *Cochran,* 365 U.S. 525 (1961), in which this Court held that Petitioner was deprived of due process because of the trial

Thereafter, on January 8, 1962, Petitioner filed a motion in this Court for leave to proceed *in forma pauperis* and a petition for certiorari. On June 4, 1962, this Court entered an order in the present case granting the motion for leave to proceed *in forma pauperis* and granting the petition for certiorari (R. 47-48). In the order granting the writ, the Court requested counsel "to discuss the following in their briefs and oral argument: 'Should this Court's holding in *Betts* v. *Brady,* 316 U.S. 455, be reconsidered?' " (R. 47-48).

At the request of counsel for Petitioner herein, the trial court proceedings were certified directly to this Court by the clerk of the trial court after the petition for certiorari was granted. The Florida Attorney General takes the position in this Court that the transcript of the trial proceedings should not be considered by this Court in deciding the present case because it was not before the Florida Supreme Court, *op. cit.* note 2, *supra.* We do not agree with this contention,[6] but we believe that the question need not be decided because reversal of the judgment below is necessary without reference to the trial court transcript.

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court's refusal to grant a continuance in order that Petitioner might have the assistance of the counsel he had retained.

Four of the last eight right-to-counsel cases decided by this Court originated in Florida. *Carnley* v. *Cochran,* 369 U.S. 506 (1962); *Reynolds* v. *Cochran,* 365 U.S. 525 (1961); *McNeal* v. *Culver,* 365 U.S. 109 (1961); *Cash* v. *Culver,* 358 U.S. 633 (1959).

[6] Petitioner submits that the record before a lower court may be supplemented in this Court, and in the exercise of its jurisdiction over the present case, this Court may consider the proceedings in the trial court to the extent necessary and appropriate. See *Petitioner's Memorandum in Opposition to Respondent's Motion to Strike Paragraphs 1 and 2 of Petitioner's Designation for Printing,* pp. 2-3.

OPINION BELOW

The order of the Supreme Court of Florida denying Petitioner's application for a writ of habeas corpus appears as *Gideon* v. *Cochran,* 135 So. 2d 746 (Fla. 1961) (R. 47).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves Section 1 of the Fourteenth Amendment, U. S. Const.; Fla. Const., Declaration of Rights, §11; and Fla. Stats. §810.05 and §909.21 (1961). These provisions are reprinted in Appendix A, *infra.*

QUESTIONS PRESENTED

I. Does the denial by a state court of a request by an indigent defendant for the appointment of counsel to assist him at a trial for a serious criminal offense constitute a deprivation of the defendant's rights in violation of the Fourteenth Amendment? Should this Court's holding in *Betts* v. *Brady*, 316 U.S. 455 (1942), be overruled?

II. In the present case, did the refusal of the state court to appoint counsel to assist Petitioner at trial, Petitioner having expressly requested such assistance, deprive Petitioner, an indigent person, of his rights in violation of the Fourteenth Amendment?

SUMMARY OF ARGUMENT

This case presents the issue whether *Betts* v. *Brady,* 316 U.S. 455 (1942), should be overruled. It illustrates the denial of due process and equal protection consequent upon the refusal to appoint counsel in a state felony prosecution; but we cannot urge that the circumstances presented by the case are "special" rather than typical. The Petitioner is not illiterate, mentally incompetent, or inexperienced. The statute defining the offense with which petitioner is charged presents issues of fact and law; but so do most criminal statutes. The conduct of the trial left much to be desired; but this is an inevitable consequence of the absence of defense counsel, and we cannot attribute to the trial judge or prosecutor animus or a deviation from normal standards.

Betts v. *Brady* should be overruled. The Fourteenth Amendment requires that counsel be made available to the accused in every case of arrest and prosecution in the states for serious criminal offense.

I

An accused person cannot effectively defend himself. The assistance of counsel is necessary to "due process" and to a fair trial. Without counsel, the accused cannot possibly evaluate the lawfulness of his arrest, the validity of the indictment or information, whether preliminary motions should be filed, whether a search or seizure has been lawful, whether a "confession" is admissible, etc. He cannot determine whether he is responsible for the crime as charged or a lesser offense. He cannot discuss the possibilities of pleading to a lesser offense. He cannot evaluate the grand or petit jury. At the trial he cannot interpose objections to evidence

or cross-examine witnesses, etc. He is at a loss in the sentencing procedure.

An indigent is almost always in jail, unable to make bail. He cannot prepare his defense.

There is no distinction between the need for counsel in federal and in state cases. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), recognizes the need in federal cases.

The trial judge cannot perform the function of counsel.

There is no basis for distinguishing between the need for counsel in capital and in non-capital cases. Indeed, the need may be greater in the latter because of complexity of issues. This Court has rejected the distinction between capital and other offenses in the court-martial cases and with respect to the obligation of the states to furnish transcripts to destitute persons on appeal. (*Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234 (1960); *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

To convict the poor without counsel while we guarantee a right to counsel to those who can afford it is also a denial of equal protection of the laws.

II

Regard for federalism does not justify the "special circumstances" restriction of *Betts* v. *Brady.* On the contrary, the rule creates friction between state and federal courts. It impairs the values of federalism.

All but five states now make provision for appointment of counsel for indigents in all felony cases, either expressly or as a matter of practice.

The "special circumstances" rule involves federal supervision over state courts in a most obnoxious form: *ad hoc* and *post facto*.

The absence of counsel is responsible in large measure for the flood of habeas corpus petitions in the federal courts which create state-federal friction and constitute a burden on the federal system. The *post facto* nature of *Betts* v. *Brady* means that prisoners languish in jail, sometimes for many years, before their rights are vindicated.

III

The "special circumstances" test is not capable of proper application. This Court has applied it in ways which seem contradictory. State courts have disregarded or misapplied it.

Proper application of the principle of federalism dictates that the constitutional requirement of due process be affirmed and not curtailed, and that the states should be given latitude in devising *methods* to assure compliance with the constitutional principle.

The supposed practical consequences should not frustrate vindication of the constitutional principle. *Cf. Mapp* v. *Ohio,* 367 U.S. 643 (1961). In any event, prisoners whose convictions are set aside because of denial of counsel may be retried.

ARGUMENT

I. THE FOURTEENTH AMENDMENT REQUIRES THAT COUNSEL BE APPOINTED TO REPRESENT AN INDIGENT DEFENDANT IN EVERY CRIMINAL CASE INVOLVING A SERIOUS OFFENSE

In *Betts* v. *Brady,* 316 U.S. 455, decided in 1942, this Court ruled that the 14th Amendment does not require that the state courts furnish counsel to an indigent defendant in a non-capital case unless the total facts and circumstances in the particular case show that there has been "a denial of fundamental fairness, shocking to the universal sense of justice." *Id.* at 462. In short, counsel need not be appointed unless there are "special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense." *Palmer* v. *Ashe,* 342 U.S. 134, 135 (1951).[7]

For twenty years, this Court, the lower federal courts, and the courts of a number of states have been

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[7] In *Uveges* v. *Pennsylvania,* 335 U.S. 437 (1948), Mr. Justice Reed summarized the situation, which has obtained until the present, as follows:

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance . . . Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See Betts v. Brady . . . 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 complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group hold that the accused must have legal assistance under the Amendment . . . whether he requests counsel or not." (335 U.S. at 440-441).

charged with the duty of administering this rule. The experience has not been a happy one. We respectfully suggest that the data, summarized in this brief, demonstrate that the quality of criminal justice and the relations between the federal and state courts, have suffered as a result of *Betts* v. *Brady.*

We believe that "time has set its face"[8] against *Betts* v. *Brady;* that a fresh evaluation of the holding in that case is timely and appropriate; and that *Betts* v. *Brady* should be overruled in the present case.[9]

In the following portions of this brief, we believe that we shall demonstrate that the "special circumstances" rule, devised to assure the 14th Amendment's requirement of due process in state criminal cases, has not achieved its basic constitutional objective: It has not assured and cannot be expected to assure that counsel will be provided where necessary in the interests of fundamental fairness in state criminal proceedings.

We shall also show, we believe, the overwhelming evidence that the rule of *Betts* v. *Brady* is not compatible with due respect for the separate processes of the states. It is not an appropriate adaptation of the 14th Amendment to the demands of federalism. To

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[8] *Mapp* v. *Ohio,* 367 U.S. 643, 653 (1961).

[9] "[T]his court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions," *Smith* v. *Allwright,* 321 U.S. 649, 665 (1944), and the Court has often overruled its earlier decisions in light of additional experience. Reappraisal is particularly appropriate in cases raising issues of due process, since " 'Due process' is, 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." *Griffin* v. *Illinois,* 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

the contrary, it is a rule which compels continual, unseemly, and improper intervention by the federal courts in state criminal proceedings—not on the basis of applying a concrete, fundamental principle but by the corrosive and irritating process of case-by-case review. *Betts* v. *Brady* has produced and will continue to produce a series of *ad hoc* decisions by this Court and other federal courts—exercising supervision over the conduct of trials by state courts and state judges —which are disruptive of our federal system and which create friction between the states and the federal government.

In other words, *Betts* v. *Brady* has not meant, and will not mean, *less* federal intervention in state criminal proceedings than would be the case if the 14th Amendment were construed to require that counsel be furnished in all state criminal prosecutions. Because of the intensely factual, subjective, and *post-facto* nature of its standards, *Betts* v. *Brady* means *more* federal intervention on a case by case basis, and in a much more exacerbating form.

The present case, in our opinion, raises the fundamental question as to whether *Betts* v. *Brady* should be overruled. Apart from the technical and procedural question resulting from the failure of petitioner to allege special circumstances and from the nature of the proceedings before the Florida Supreme Court to which we have referred above, we can claim neither extreme youth, inexperience, mental incapacity, nor illiteracy on the part of the defendant. It is true that the defendant could not possibly have fully understood the legal subtleties of the crime with which he was charged; he could not have been aware of the decisions of the Supreme Court of Florida or principles of *corpus*

juris which might affect his defense. He could not have been alert to the opportunities theoretically offered by the law to cope with the problems of jury selection or the testimony of witnesses adduced by the State. It is true, too, that the judge in Gideon's case did not serve as Gideon's defense counsel—although it is obvious that he tried to conduct the trial fairly.

In Appendix B to this Brief we analyze the specific points that demonstrate that Gideon did not receive the benefits and protection which would presumably have been afforded him by counsel. We believe that these constitute a vivid demonstration of the fact that he was deprived of his due process rights under the Fourteenth Amendment: that he did not have a fair trial in the constitutional sense. But it is our opinion that these points are not peculiar to Gideon's case. We believe, *mutatis mutandis,* these points are present in every criminal prosecution. In short, we believe that the circumstances of this case are no more "special" than in other criminal cases—unless we are to draw a line between tweedledee and tweedledum. We are therefore of the opinion that the fundamental question of *Betts* v. *Brady* is at issue in the present case.

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1. *The aid of counsel is indispensable to a fair hearing.* As we shall discuss, we believe that the real point of difference between the advocates and opponents of the "special circumstances" rule of *Betts* v. *Brady* relates to the requirements of federalism in the application of the Fourteenth Amendment. It is not the issue of whether counsel is or is not needed for a trial which is fair and decent. The necessity for counsel in a criminal case is too plain for argument. No individual who is not a trained or

experienced lawyer can possibly know or pursue the technical, elaborate, and sophisticated measures which are necessary to assemble and appraise the facts, analyze the law, determine contentions, negotiate the plea, or marshal and present all of the factual and legal considerations which have a bearing upon his defense.[10] Even a trained, experienced criminal lawyer cannot—and will not, if he is sensible—undertake his own defense.[11]

In the absence of counsel an accused person cannot determine whether his arrest is lawful; whether the indictment or information is valid; what, if any, preliminary motions should be filed. He cannot accurately evaluate the implications of a plea to a lesser offense, and he is at a loss in discussions with the prosecuting attorney relating to such a plea.[12]

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[10] The rule that only a qualified and licensed lawyer may represent another in our courts is based, in part at least, on the assumption that a certain amount of skill is necessary to the task.

[11] "He that is his own lawyer has a fool for a client." *The Oxford Dictionary of English Proverbs* 112 (2d ed. 1948). This adage has a psychiatric basis. To expect that an accused person, particularly an indigent, usually friendless, defendant can or will rise to the level of operating skill and efficiency necessary to functioning in the criminal process, is to expect the impossible. Most defendants, after arrest and imprisonment, cannot even function at their normal level of competence.

[12] "Men entering an initial plea of not guilty were significantly more often represented by defense attorneys than the men pleading guilty immediately." Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice,* 46 J.Crim.L.,C. & P.S. 780, 782 (1956).

"The methods used by the prosecutor and the judge to obtain a plea of guilty to a lesser charge from an unrepresented defendant often amount to downright coercion performed in open court." Dash, *Cracks in the Foundation of Justice,* 46 Ill. L. Rev. 385, 393 (1951).

The indigent, apart from all other considerations, has probably been in jail from the time of arrest because of inability to furnish bail.[13] How can he prepare his case? And how unreal it is to suppose that a layman can conduct a *voir dire* of the petit jury, or cross-examine the prosecution's witnesses, or interpose objections to incompetent and prejudicial testimony. See Douglas, J., concurring in *Carnley* v. *Cochran,* 369 U.S. 506 (1962). The truth is that "The unrepresented defendant in many cases does not really know what is going on . . ." Ass'n. of the Bar of the City of New York, *Report of the Magistrate's Courts Visitation Committee* 30 (undated). As this Court pointed out in *Reynolds* v. *Cochran,* 365 U.S. 525, 532-33 (1961), "even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."[14]

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[13] A comprehensive study of the New York City Municipal Courts revealed that, in 1958, 51% of all defendants did not post bond. Note, *A Study of the Administration of Bail in New York City,* 106 U. Pa. L. Rev. 693, 707 (1958). A field study of the metropolitan courts of Philadelphia established that 75% of all defendants charged with serious crimes where bail is set by the court were held in jail from the time of arrest to trial. Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. Pa. L. Rev. 1031, 1048 (1954). See also Note, *Bail: An Ancient Practice Reexamined,* 70 Yale L. J. 966, 970 (1961).

[14] In a powerful passage, often quoted, Mr. Justice Sutherland summed up why the assistance of counsel is indispensable to a fair hearing as follows:

> "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. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of

In the event of conviction, the unrepresented defendant is further seriously disadvantaged at the sentencing stage.

> "Automatic sanctions, which predominated in earlier historical periods, have been largely replaced by judicial discretion. . . . Consequently, counsel may be called upon to play a role in sentencing which requires wide knowledge and experience." Ass'n. of the Bar of the City of New York, Special Committee to Study Defender Systems, *Equal Justice for the Accused* 35-36 (1959).

See also *Gadsden* v. *United States,* 223 F. 2d 627, 630-33 (D.C. Cir. 1955); Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 803, 806 (1961).

Moreover, it is patent that many constitutional rights are meaningless in the absence of legal assist-

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evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932).

See also, Pollock, *Equal Justice In Practice,* 45 Minn. L. Rev. 737, 741-743 (1961); Note, *Metropolitan Criminal Courts of First Instance,* 70 Harv. L. Rev. 320 (1956); Willcox and Bloustein, *Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime,* 59 Colum. L. Rev. 551 (1959); Barth, *The Price of Liberty* 159 (1961).

ance. As an eminent State Supreme Court judge has stated: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 8 (1956).

In the past twenty years, this Court has stated a number of principles of constitutional law with respect to state criminal procedure, which have a direct and practical bearing on the conduct of trials. The law of involuntary confessions and searches and seizures as applied to the states, for example, postdates almost in its entirety the decision in *Betts* v. *Brady.*[15] Important procedural safeguards cannot be implemented effectively without the assistance of counsel. An uncounseled defendant manifestly cannot be expected, for example, to be a master of the intricacies of the law relating to searches and seizures, e.g., whether a search warrant is required, whether

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[15] See *Mapp* v. *Ohio,* 367 U.S. 643 (1961); *Culombe* v. *Connecticut,* 367 U.S. 568 (1961); *Spano* v. *New York,* 360 U.S. 315 (1959); *Rochin* v. *California,* 342 U.S. 165 (1952).

There have been important developments since 1942 relating to other aspects of state criminal procedure, e.g., the prohibition against cruel and unusual punishment, *Robinson* v. *California,* 370 U.S. 660 (1962); the right to a validly selected grand jury and to a fair trial by the petit jury, *Reece* v. *Georgia,* 350 U.S. 85 (1955); *Shepherd* v. *Florida,* 341 U.S. 50 (1951) (concurring opinion of Jackson and Frankfurter, JJ.); the necessity for a public trial, *In re Oliver,* 333 U.S. 257 (1948); and misconduct by the prosecution, *Alcorta* v. *Texas,* 355 U.S. 28 (1957). See Brennan, *The Bill of Rights and the States,* 36 N.Y.U. L.Rev. 761, 769-778 (1961); Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice,* 8 De Paul L.Rev. 213 (1958).

there is "probable cause," whether there has been a waiver, and so on. An inexperienced person cannot possibly appraise the implications of invoking the privilege against self-incrimination or determine whether a statement he wishes to make may constitute a waiver of the privilege.[16] In brief, what is required for the effective assertion of constitutional rights and privileges is "the assistance of a learned gentleman to speak for an unlearned man" (5 The Speeches of the Right Hon. Charles James Fox in the House of Commons (London 1815) 78, quoted by Mr. Justice Clark in *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 244, n. 10 [1960]).

2. *The absolute requirement of counsel in federal prosecutions confirms the need for an attorney.* The parallel development of the right to counsel in the federal courts confirms the conclusion that an unrepresented defendant cannot adequately advocate his rights. In 1938, in *Johnson* v. *Zerbst,* 304 U.S. 458, this Court held that counsel must be furnished in every case to a person tried in the federal courts. To quote the Court:

> "If the accused . . . is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid con-

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[16] "Even if advised that he has a right to speak, the unrepresented defendant often chooses to remain silent for fear of self-incrimination. The manner in which the assistant district attorneys inform unrepresented defendants of their constitutional rights to remain silent seems to imply that it is always to the accused's great advantage to refuse to speak." Comment, *Preliminary Hearings on Indictable Offenses in Philadelphia,* 106 U. Pa. L. Rev. 589, 591 (1958).

> viction and sentence depriving him of his life or his liberty." 304 U.S. at 468.[17]

Johnson v. *Zerbst* was not the unchallenged product of the ineluctable language of the Sixth Amendment. There are those who assert that the right conferred on the accused "to have the assistance of counsel for his defense" meant only "that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him," and that it did not comprehend "the right of a prisoner to have counsel assigned to him by the court if, for financial or other reasons, he was unable to retain counsel." Holtzoff, *The Right of Counsel Under the Sixth Amendment,* 20 N. Y. L. Q. Rev. 1, 7-8 (1944).

That view was rejected by the Court in *Johnson* v. *Zerbst.* In speaking for the Court, Mr. Justice Black made it clear that the conclusion of the case rested upon

> "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel." 304 U.S. at 462-463.

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[17] The ruling is reflected (although inadequately, in our view) in Rule 44, Fed. R. Crim. P.: "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."

Our accusatorial system of criminal justice presupposes that the cause of the defendant as well as that of the state will be vigorously advocated.[18]

It makes no sense to urge that the availability of counsel is required in the federal courts in order "to insure fundamental human rights of life and liberty" (*id.* at 304 U.S. 462), but that it is not fundamental if the prosecution occurs in a state courthouse.[19] We do not think it arguable that federal judges or prosecutors are less solicitous of the accused than are their state counterparts, or that the indigent accused in state criminal proceedings are more learned in the law than their counterparts who are involved in the federal process.

3. *The trial judge cannot act as defense counsel.* The trial judge must assure himself by a meticulous

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[18] Our adversary system presumes that "each litigant is most interested and will be most effective in seeking, discovering, and presenting the materials which will reveal the strength of his own case and the weakness of his adversary's case so that the truth will emerge to the impartial tribunal that makes the decision." Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 3 (1956).

[19] "An English court will not hear a criminal case without a defense counsel if the defendant desires one." Section of Criminal Law of the A.B.A., *A Comparative Study of Criminal Law Administration in the United States and Great Britain,* 50 J. Crim. L., C. & P.S. 59, 66 (1959). See Devlin, *The Criminal Prosecution in England* 127 (1958): "[I]t is very rare that an accused who has any sort of defense to put forward has to prepare and present it without legal assistance"; Waddington, *The Development of Legal Aid in England Since 1949,* 48 A.B.A.J. 1029, 1030 (1962): "[T]he tendency today is to grant legal aid in all cases, at all stages of the trial and of any appeal, and whether or not there is a plea of guilty.

and thorough investigation that the accused has not ignorantly or incompetently waived his right to counsel, *Von Moltke* v. *Gillies,* 332 U.S. 708, 723-24 (1948), but we do not believe that it can properly be urged that the trial judge can or should perform the functions of ascertaining and advancing the legal and factual points available to the accused.[20] The judge comes on the scene too late in point of time; crucial events have already taken place and important decisions made by default or otherwise. The judge cannot investigate the facts; he cannot and should not engage in the probing of a defendant necessary for representation; he cannot and should not cross-examine the state's witnesses.

In a word, a man cannot act both as trial judge and as defense counsel. As Mr. Justice Sutherland stated, in speaking for the Court in *Powell* v. *Alabama,* 287 U.S. 45, 61 (1932):

> "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of

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[20] Blackstone characterized the English common law rule denying the assistance of counsel in most felony prosecutions (changed by Parliament in 1836, 6 & 7 W. 4, 114, s.1) as "[A] rule which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law." IV Bl. Comm., pp. 348-350 (Clarendon Press 1767). Blackstone noted that Coke (3 Inst. 137) gave as a reason for denying the right to counsel that "the evidence to convict a person should be so manifest, as it could not be contradicted." Blackstone pointed out that "to say the truth, the judges themselves are so sensible of this defect that they allow counsel to stand by the prisoner, suggest questions or even ask them."

> 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."

4. *The distinction between capital and non-capital offenses does not furnish a valid basis for deciding when to appoint counsel.* In one class of criminal cases tried in the state courts—those involving capital offenses—this Court has rejected the *Betts* v. *Brady* rule. *Hamilton* v. *Alabama,* 368 U.S. 52 (1961); *Uveges* v. *Pennsylvania,* 335 U.S. 437, 441 (1948); *Bute* v. *Illinois,* 333 U.S. 640, 674 (1948). As the Court stated in *Hamilton* v. *Alabama, supra:* "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." 368 U.S. at 55.[21]

We do not believe this distinction between capital and non-capital offenses furnishes an appropriate or constitutionally valid basis for determining when counsel must be appointed. The due process clause protects against deprivation of "liberty" and "property" as well as against deprivation of "life."[22] Moreover, the

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[21] In the present case, the trial court rejected Gideon's request for legal assistance on the grounds that "Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense." (R. 9).

[22] There are some who believe that life imprisonment is a more terrible penalty than a death sentence. See Barzun, *In Favor of Capital Punishment,* 31 American Scholar 181 (1962).

necessity for legal assistance, not the nature of the sanction, should be the controlling consideration. As one commentator has observed:

> "[I]n determining whether absence of counsel has denied a fair hearing, the important consideration seems less the penalties that may be imposed than the *need* for skilled representation. Any experienced defense lawyer is likely to testify that most murder cases, in which capital penalties are involved, are by no means the most difficult to try or those in which representation is most urgently required. Indictments charging such crimes as embezzlement, confidence game, or conspiracy are likely to place the defendant in a far more helpless position. The distinction that the Court has drawn lacks integrity, and so long as it persists, the law of the subject will remain in a state of unstable equilibrium." Allen, *The Supreme Court and State Criminal Justice,* 4 Wayne L. Rev. 191, 197 (1958).

This Court has specifically rejected the distinction between capital and non-capital offenses in the military court-martial cases, involving rights secured by Article III and the Fifth and Sixth Amendments. *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234 (1960). In view of the importance of the court-martial cases to this particular issue, we discuss the cases at more length in Appendix C, *infra.*

It is true that these court-martial decisions involved the power of Congress under Art. 1, §8, "To make Rules for the Government and Regulation of the land and naval Forces" and did not involve limitations upon state power under the Fourteenth Amendment. The cases turned upon the status of the accused. But if the capital and non-capital distinction is rejected

in a case involving the right to trial by jury before a constitutionally appointed judge, among other privileges, we perceive no reason why it should be considered as controlling with respect to the closely allied right to counsel.

Further, in 1961, this Court in *Ferguson* v. *Georgia,* 365 U.S. 570, rejected the capital-non-capital distinction in a Fourteenth Amendment case. The Court concluded in that case that the Fourteenth Amendment invalidated a Georgia statute which prohibited a defendant in a criminal case from testifying under oath in his own defense, in response to questions of counsel. The Court stated:

> "Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a non-capital offense, or represented by appointed counsel." 365 U.S. at 596.

Griffin v. *Illinois,* 351 U.S. 12 (1956), a non-capital case, similarly rejected the capital-non-capital distinction with respect to the availability to indigents of transcripts for appeal purposes.[23]

In sum, we submit that the possibility of a death sentence does not constitute a valid constitutional cri-

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[23] Indigent defendants sentenced to death were provided by Illinois with a free transcript for purposes of appellate review, but in all other cases the defendant was required to buy the transcript. *Id.* at 14. The Court held that the state was required to furnish means for effective review to all defendants. The dissenting Justices urged that the distinction between capital and non-capital cases made by Illinois law was valid and reasonable. *Id.* at 27-28.

terion for determining who shall have the assistance of counsel.

5. *Denial of counsel to the indigent violates both due process and equal protection.* The refusal to appoint an attorney to represent a destitute person results in discrimination against defendants based solely upon poverty. There is no doubt that a defendant in a state criminal trial has an unqualified right under the Fourteenth Amendment to be heard through counsel he has retained. *Chandler* v. *Fretag,* 348 U.S. 3, 9 (1954); see *In re Groban's Petition,* 352 U.S. 330, 332 (1957). We submit that if a person with funds is entitled to be heard through an attorney, the same privilege must be extended to indigents. In the case of those able financially to hire counsel, the rule is not limited to capital cases or to "special circumstances." It is absolute and complete, and a state may not restrict it. How, then, can the right be restricted in the case of the poor? We have agreed since *Powell* v. *Alabama,* 287 U.S. 45 (1932), that the state has a duty to appoint counsel for the indigent in at least some criminal cases in order to meet the requirements of due process. If this is so, counsel must be provided in all criminal cases in which there is a constitutional requirement to permit counsel to appear and act for those who have the funds to hire them. The indigent defendant cannot be denied an "unqualified right" solely because of poverty; to do so results in a denial of equal protection. "The need of counsel is the same, whatever the economic status of the accused." *McNeal* v. *Culver,* 365 U.S. 109, 118 (1961) (Douglas, J., concurring); see also Douglas, *Vagrancy and Arrest on Suspicion,* 70 Yale L.J. 1, 10-11 (1960).

This principle was articulated in *Griffin* v. *Illinois,* 351 U.S. 12 (1956), which held that the Fourteenth Amendment requires that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19. The Court said that the

> "constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. 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.'" 351 U. S. at 17.

And the Court added:

> "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. . . . There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 17-19.

See *Willcox* and *Bloustein, The Griffin Case—Poverty and the Fourteenth Amendment,* 43 Cornell L.Q. 1, 23 (1957); see also *Smith* v. *Bennett,* 365 U.S. 708 (1961); *Douglas* v. *Green,* 363 U.S. 192 (1960); *Burns* v. *Ohio,* 360 U.S. 252 (1959); *Eskridge* v. *Washington Prison Bd.,* 357 U.S. 214 (1958); *cf. Coppedge* v. *United States,* 369 U.S. 438 (1962).

Where counsel are not designated to assist indigent persons, whether a defense of any kind will be asserted, and the type of defense, tends to depend more upon the personality and temperament of the accused than upon guilt or innocence or any other factor. The large percentage of guilty pleas in our courts [24] may reflect the helplessness of the arrested and their lack of counsel as well as the efficiency of the police. Certainly, the frequency of guilty pleas suggests that those who are arrested, particularly the penniless and persons who are members of minority groups, are more likely hopelessly to resign themselves to fate than aggressively to act like the defense counsel portrayed on television. In sum:

> "To say that trials without counsel can be fair is to assume either that the defense which counsel might have presented would not have changed the result in the case or that in certain types of cases counsel serves no useful function. The first assumption is hindsight and unprovable. The second, if true, would convict a portion of the bar of taking money under false pretenses in all those 'simple' cases where counsel accepts a retainer but

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[24] "[T]he overwhelming proportion of cases (75 to 90 per cent) . . . are decided by pleas of guilty." Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L. J. 1149, 1189 (1960).

"Men entering an initial plea of not guilty were significantly more often represented by defense attorneys than the men pleading guilty immediately." Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice,* 46 J. Crim. L., C. & P. S. 780, 782 (1956).

"If the defendant is represented by counsel, it is more likely that he will be permitted to present a defense." Comment, *Preliminary Hearings on Indictable Offenses in Philadelphia,* 106 U. Pa. L. Rev. 589, 591 (1958).

apparently cannot influence the result. We cannot with justice keep the existing 'fight' theory of criminal law and force the indigent defendant to fight alone. If our vaunted claim of 'equal justice under law' is to be more than an idle pretense, the right to have counsel must be extended in practice to all persons accused of crime." Beaney, *The Right to Counsel in American Courts* 234-235 (1955).

II. THE DEMANDS OF FEDERALISM DO NOT DICTATE CONTINUED ADHERENCE TO BETTS V. BRADY

In view of the foregoing, we believe that the real argument against the position that the 14th Amendment requires that counsel be furnished to indigent persons in all state criminal proceedings is that it "would disregard the basic and historic power of the states to prescribe their own local court procedures," i.e., the demands of federalism. *Bute* v. *Illinois,* 333 U.S. 640, 668 (1948).[25] We submit two answers to this argument: *First,* we do not believe it necessary to dilute, denigrate, and diminish the quality of due process in our criminal proceedings or subtract from the equal administration of justice in deference to the few states, like Florida, which continue to defy the general opinion as to the right to counsel. *Second,* we believe that the argument is based on a premise that experience has rejected. The "special circumstances" rule

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[25] The history of the right to counsel in England and the United States during the past three centuries reflects a steady, unmistakable evolution toward complete recognition of the right. See *Powell* v. *Alabama,* 287 U.S. 45, 60-65 (1932); Beaney, *The Right to Counsel in American Courts* 8-26, 225-228 (1955); Becker and Heidelbaugh, *The Right to Counsel in Criminal Cases—An Inquiry into the History and Practice in England and America,* 28 Notre Dame Law. 351 (1953).

increases the problems of federalism. It does not decrease them.

1. *The great majority of the states now make provision for the appointment of counsel in all felony cases, either explicitly or as a matter of practice.* In 1942, the Court concluded in *Betts* v. *Brady,* after canvassing the law in each state, that

> "in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial." *Betts* v. *Brady,* 316 U.S. at 471.

This factual premise of *Betts* v. *Brady* has evaporated during the past twenty years.

> "Although not every state today offers counsel to the indigent defendant in the serious, but non-capital, criminal case, the trend is unmistakably in that direction." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 9 (1956).

In 1961, in an appendix attached to a concurring opinion in *McNeal* v. *Culver,* 365 U.S. 109, 119-122, Mr. Justice Douglas listed 35 states which provide for "Appointment of counsel for indigents in all felony cases, as of course, by force of the State Constitution, statutes, court rule, or judicial decision." (*Id.* at 120). Subsequent to compilation of the appendix, Colorado made appointment of counsel obligatory in all felony cases, Colo.R.Crim.P. 44 (set out in 34 Rocky Mt. L. Rev. 1, 89 [1961]), and Michigan apparently should be added to the list, see Mich. Ct. R. 35A (Honigman's Mich. Ct. Rules Anno.).

There are thus presently thirty-seven states which expressly provide, in one form or another, for the designation of counsel in behalf of destitute defendants in all felony cases. In a majority of the states listed in Justice Douglas' appendix in *McNeal* v. *Culver, supra,* the court must inform the accused of his right to counsel and inquire whether he desires an attorney. In all thirty-seven states appointment is mandatory in all felony cases if requested by the defendant. See Appendix, "Provision for the Assignment of Counsel for Indigent Defendants in Criminal Cases," in Ass'n. of the Bar of the City of New York, Special Committee to Study Defender Systems, *Equal Justice for the Accused* (1959).

Further, a study, just completed, concludes on the basis of extensive documentation that of the remaining thirteen states, it is the general practice in eight states —Pennsylvania, Maryland, Maine, New Hampshire, Rhode Island, Vermont, Delaware, and Hawaii—to furnish legal assistance in each case where such aid is requested. Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused,* 30 U. of Chi. L. Rev. 1 (1962).[26]

There remain only five states— Alabama, Florida, Mississippi, North Carolina, and South Carolina— which do not make provision for appointment of counsel in behalf of indigents in all felony cases. Even in these states, however, there are cities and counties where public defenders or court appointed counsel are assigned to represent impoverished defendants at vari-

[26] Professor Kamisar made available to counsel the manuscript of his valuable article prior to its publication.

ous stages in the proceeding.[27] See Kamisar, *op. cit. supra.*

There is far less contrariety of views among the states with respect to the right to counsel than was the case with respect to the exclusion of evidence secured by an illegal search and seizure. When *Mapp* v. *Ohio,* 367 U.S. 643, was decided in 1961, one-half of the states still adhered to the rule that illegally seized evidence was admissible. 367 U.S. at 680 (dissenting opinion); see *Elkins* v. *United States,* 364 U.S. 206, 224 (1960). This Court held, however, that the 14th Amendment required that the state courts exclude unlawfully procured evidence. With respect to the plea that the decision infringed the principle of federalism, the Court said (367 U.S. at 656):

> "This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of

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[27] "The practice in a number of the larger counties in Florida also goes far beyond the demands of *Betts.* In Dade County (Miami), the largest county in the state, 'the Public Defender acts as counsel for all indigent felony defendants who are in jail and unable to make bond,' entering the picture 'at or before arraignment.' The same practice prevails for the large counties of Broward (Fort Lauderdale) (public defender) and Duval (Jacksonville) (court appointed counsel). A public defender also operates in Hillsborough County (Tampa), but apparently represents only those who have pled not guilty and are awaiting trial. Thus, despite the presence of a public defender, indigent defendants in this populous county are without counsel at the 'critical' arraignment stage. The practice throughout the rest of the state varies a good deal, but indigent non-capital defendants, it appears, are not furnished counsel generally, although they are in the 'more serious and more complicated cases.'" Kamisar, *op. cit. supra.* See Sen. Judiciary Committee, Subcommittee on Constitutional Rights, *Legal Counsel for Indigent Defendants in Federal Courts,* p. 9 (1961).

> a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession . . ."

We recognize, of course, that resolution of an important question of constitutional law cannot and should not be made simply by taking a census of the states. But the practice among the states was emphasized in *Betts* v. *Brady* as a factor to be used in determining the standard of procedural fairness required by the due process clause. *Betts* v. *Brady,* 316 U.S. at 465. There is no doubt that there is today widespread consensus among the states that legal assistance should be furnished to indigent persons. Further, it is a principle which has the overwhelming support of the bar.[28] The task here is essentially a modest one: to bring into line with the consensus of the states and professional opinion the few "stragglers" who persist in denying fair treatment to the accused.*

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[28] See e.g., Ass'n. of the Bar of the City of New York, Special Committee to Study Defender Systems, *Equal Justice for the Accused* 56 (1959). There are now 96 defender offices in the United States, including 77 public defender offices. Brownell, *Legal Aid in the United States, 1961 Supplement* 14 (1961). "The Legal Aid movement is now almost universally accepted as being morally and ethically correct and as deserving the support of the general public." *Summary of Conference Proceedings of the National Legal Aid and Defender Association* 9 (1959). See also Symposium, *The Right to Counsel,* 45 Minn. L. Rev. 693-896 (1961).

* Counsel for Petitioner has been informed that twenty-two states are filing a joint brief as Amici in the present case urging that *Betts* v. *Brady* be overruled. The states involved are Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, Ohio, North Dakota, Oregon, Rhode Island, South Dakota, Washington, and West Virginia.

2. *Betts v. Brady has created friction between the states and the Federal Courts.* Two decades of experience have borne out the forecast of Mr. Justice Black, dissenting in *Betts* v. *Brady,* that the "special circumstances" test would require this Court and other federal courts to exercise "vast supervisory powers" over the state courts. 316 U.S. at 475. *Betts* v. *Brady* has engendered conflict between the federal and state courts because of the case by case review it entails and because it does not prescribe a clearcut standard which the state courts can follow. As one commentator has noted: "[T]he very vagueness of the fair-trial test has encouraged recourse to the lower federal courts and to the Supreme Court by state convicts." Beaney, *The Right to Counsel in American Courts* 196 (1955).

A vast number of petitions have been filed in the federal courts collaterally attacking the validity of convictions for failure to assign counsel. A recent study of 35 federal habeas corpus cases in which a state prisoner successfully attacked the judgment under which he was committed led to the following conclusions:

> "A most striking fact discovered from the 35 cases studied is the dominance of the issue of right to counsel as the contention most likely to succeed in federal habeas corpus. In roughly half of the cases, the state judgment fell on this ground. As only four of these cases involved a capital offense, *the largest stumbling block in the administration of state criminal law is revealed as the nonabsolute right to counsel for indigents in noncapital cases.*" Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners,* 108 U. Pa. L. Rev. 461, 483 (1960) (emphasis supplied).

Moreover, the "special circumstances" rule involves federal supervision over the state courts in its most noxious form. In effect, the federal courts are given a roving commission to scrutinize the proceeding in the state court to determine if it is "shocking to the universal sense of justice." It is difficult to conceive of a test more likely to promote friction between federal and state tribunals. But, as Mr. Justice Stewart has stated, "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, 221 (1960).

Finally, the flood of habeas corpus petitions spawned by *Betts* has led to agitation to curtail the "Great Writ." The undesirable consequences of *Betts* thus extend beyond the immediate issue of right to counsel. A decision overruling *Betts* would benefit the federalist principle by eliminating a major irritant.

3. *Experimentation by the States will not be eliminated if the special circumstances is jettisoned.* An absolute rule that counsel must be furnished indigents accused of serious offenses will still leave open an area in which federalism will operate. The states undoubtedly will meet the demands of the rule in a variety of ways. Some states may elect to provide counsel through a governmentally financed public defender system;[29] others through court assignment of

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[29] A bill (S. 2900) authorizing each federal district court to appoint a public defender was approved by the Senate in the 87th Congress, 2d Session. See 108 Cong. Rec. 21079 (Oct. 4, 1962). The bill provides that if the court "is satisfied that a defendant charged with a felony or misdemeanor (other than a petty offense as defined in [18 U.S.C. § 1(3)]) is unable to employ counsel because he is indigent, it may assign the public defender to represent such defendant . . ." Provision is made for compensating the public defender.

members of the bar; still others by use of a privately financed voluntary defender system. See A'ssn. of the Bar of the City of New York, Special Committee to Study Defender Systems, *Equal Justice for the Accused* 47-53 (1959). Some states may choose to follow the system established by Congress in the District of Columbia Legal Aid Act, (74 Stat. 229, D. C. Code Anno. §§2-2201-2210 (1961 ed.)), which provides for compensation to counsel employed by a publicly financed legal aid agency and reimbursement of expenses to volunteer or court-assigned counsel.[30]

In other words, the states will remain at liberty to experiment and to adopt a system for the appointment of counsel consonant with community needs and resources, subject only to the requirement that the system adopted fulfill the constitutional imperative and guarantee effective legal aid to all persons accused of a serious offense who do not competently and intelligently waive such assistance. We believe that this is an instance of federalism in operation in an appropriate form: Under our system, we submit, the demands and the benefits of federalism should take the form of a diversity of *method*. Federalism properly considered does not demand or permit a negation of basic constitutional principle.

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[30] Students who have received a law degree and are engaged in post-graduate study under a private grant are used extensively as assistants in this program in the District of Columbia. In Massachusetts, senior law students, certified by their dean as having special ability and training, may represent indigents, provided that their activities are under the "general supervision" of a member of the bar. Rule 11, General Rules, Sup. Jud. Court (see Crane, *Court Rules Anno.*, 8 Mass. Practice [1961]).

III. THE RULE OF BETTS V. BRADY HAS NOT PROVED TO BE A SATISFACTORY STANDARD FOR JUDICIAL ADMINISTRATION

Two decades have shown that *Betts* v. *Brady* is not an operable guide.

1. The cases decided by this Court under the "special circumstances" test, to quote one commentator, "are distinguished neither by the consistency of their results nor by the cogency of their argument." Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice,* 8 De Paul L. Rev. 213, 230 (1958). The difficulty inheres in the subjective, ambiguous nature of the rule itself. Thus, the following factors have been deemed relevant in deciding whether the proceeding was "fundamentally unfair":

(i) the complexity of the statute under which the defendant is prosecuted and the nature of the offense charged;[31]

(ii) the fact that specific objections or arguments could have been, but were not, made;[32]

(iii) illiteracy or lack of education;[33]

(iv) mental illness or mental retardation;[34]

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[31] E.g., *Carnley* v. *Cochran,* 369 U.S. 506 (1962); *Chewning* v. *Cunningham,* 368 U.S. 443 (1962); *Reynolds* v. *Cochran,* 365 U.S. 525 (1961); *Pennsylvania ex rel Herman* v. *Claudy,* 350 U.S. 116 (1956).

[32] E.g., *Hudson* v. *North Carolina,* 363 U.S. 697 (1960); *Gibbs* v. *Burke,* 337 U.S. 773 (1949).

[33] E.g., *McNeal* v. *Culver,* 365 U.S. 109 (1961); *Cash* v. *Culver,* 358 U.S. 633 (1959); *Moore* v. *Michigan,* 355 U.S. 155 (1957); *Reece* v. *Georgia,* 350 U.S. 85 (1955).

[34] E.g., *McNeal* v. *Culver,* 365 U.S. 109 (1961); *Massey* v. *Moore,* 348 U.S. 105 (1954); *Palmer* v. *Ashe,* 342 U.S. 134 (1951).

(v) youth of the accused;[35]

(vi) a plea of guilty by a co-defendant;[36]

(vii) the extent of the accused's prior experience with criminal proceedings;[37]

(viii) the adequacy of guidance by the trial court;[38]

(ix) misconduct by the trial judge or the prosecutor;[39]

(x) the severity of the sentence.[40]

No standards have been delineated, however, with respect to the weight or importance to be assigned each of the foregoing factors. Thus, for example, in *DeMeerleer* v. *Michigan,* 329 U.S. 663 (1947), the Court deemed the youth of the accused (seventeen) significant and reversed his conviction, but in *Gayes* v. *New York,* 332 U.S. 145 (1947), the conviction was not set aside despite the fact that the defendant was "a lad of sixteen" (*id.* at 146) when he was convicted without counsel. In *Quicksall* v. *Michigan,* 339 U.S. 660 (1950), the Court felt it reasonable to presume from the accused's prior appearances in court that he knew of his right to counsel, and since he made no request for legal aid, his rights were held not infringed. But recently in *Carnley* v. *Cochran,* 369 U.S. 506

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[35] E.g., *Uveges* v. *Pennsylvania,* 335 U.S. 437 (1948); *DeMeerleer* v. *Michigan,* 329 U.S. 663 (1947).

[36] *Hudson* v. *North Carolina,* 363 U.S. 697 (1960); *Cash* v. *Culver,* 358 U.S. 633 (1959).

[37] *Uveges* v. *Pennsylvania,* 335 U.S. 437 (1948); *Wade* v. *Mayo,* 334 U.S. 672 (1948); *Quicksall* v. *Michigan,* 339 U.S. 660 (1950).

[38] *Gibbs* v. *Burke,* 337 U.S. 773 (1949).

[39] *Townsend* v. *Burke,* 334 U.S. 736 (1948).

[40] *Uveges* v. *Pennsylvania,* 335 U.S. 437 (1948).

(1962), the Court felt that a prior criminal record magnified the importance of the assistance of counsel because of its implications in the event the accused takes the witness stand.

It is likewise difficult to reconcile *Gryger* v. *Burke,* 334 U.S. 728 (1948), with *Townsend* v. *Burke,* 334 U.S. 736 (1948), both decided on the same day. In *Gryger,* a defendant sentenced to life imprisonment, argued that the state court mistakenly assumed that the applicable statute made the penalty mandatory. In *Townsend,* the defendant contended that the court imposed a sentence under the erroneous impression that defendant's record included convictions on two charges as to which, in fact, he had been acquitted. In both cases, the defendants, who were unrepresented, claimed that if counsel had been present the mistake would have been corrected. In *Townsend,* this Court concluded that the accused was so disadvantaged by lack of counsel that the conviction could not be permitted to stand, but in *Gryger* the Court affirmed the order denying habeas corpus. It is difficult to perceive why the denial of counsel was deemed prejudicial as a constitutional matter in one case but not in the other.

2. In the present case, the trial court did not call petitioner's attention to the "special circumstances" bearing on the right to appointment of counsel. As the state court decisions discussed below show, the "special circumstances" rule has only infrequently led the state courts to appoint counsel.[41] Some of the

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[41] We wish to invite the attention of the Court to the excellent brief submitted in behalf of Amici, the American Civil Liberties Union and the Florida Civil Liberties Union, by J. Lee Rankin, Esq., and Professor Norman Dorsen. A draft of this brief has been furnished to counsel for Petitioner. The Amici point out that of

state decisions are startling. For example, in *Commonwealth ex rel. Simon* v. *Maroney,* 405 Pa. 562, 176 A. 2d 94 (1961), pet. for cert. pending, No. 41 Misc., Oct. Term, 1962, the defendant, an 18 year old boy, was sentenced in 1942 to a term of 20 to 40 years imprisonment following a conviction for rape, robbery, and assault and battery. The Pennsylvania Supreme Court recently denied relief. It felt that denial of counsel did not produce an "ingredient of unfairness" although the court recognized that "The defendant was not wholly a normal person . . . A behavior clinic study made of the defendant shortly after his arrest revealed him to be a high grade moron with an intelligence quotient of 59," equivalent to a "mental age of only nine." 405 Pa. at 565-67, 176 A. 2d at 96, 97. The defendant was "illiterate" (405 Pa. at 570, 176 A. 2d at 99), but the court felt no prejudice occurred because "There were no 'intricacies of criminal procedure,' no 'improper conduct on the part of the court or prosecuting officials,' and nothing complicated about the charges of robbery and rape." 405 Pa. at 565-66, 176 A. 2d at 96.

In *Butler* v. *Culver,* 111 So. 2d 35 (Fla. 1959), the court refused to set aside a conviction for second degree murder for which the defendant had been sentenced to life imprisonment, although there was a "showing in this record that approximately two months after the petitioner pleaded guilty to second degree murder [without counsel], it was formally ad-

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139 decisions in state courts since *Betts* v. *Brady* on the question whether "special circumstances" required appointment of counsel, only 15 resulted in a finding that such circumstances existed. The Amici found no case in which a state trial court, seeing the possibility of unfairness, halted the proceeding in its midst so that counsel could be assigned.

judicated that he was suffering from an acute condition of insanity, described as paranoid schizophrenia." *Id.* at 37-38. The court said no contention was made on appeal that the accused was mentally incompetent at the time of trial.

In *Shaffer* v. *Warden,* 211 Md. 635, 126 A. 2d 573 (1956), the accused was convicted without counsel on charges of burglary. The accused contended that "he was only nineteen years of age and below the average in mental capacity and was suffering from a congenital speech defect." *Ibid.* The defendant maintained that as a result of his speech defect a plea of not guilty was mistaken as a plea of guilty; that he was unable because of his speech impediment to make the trial court understand the whereabouts of certain necessary witnesses; and that he vainly attempted to "stammer out" a request for appointment of counsel. 211 Md. at 636-37, 126 A. 2d at 573-74. The conviction was upheld.

The opinion of the Alabama Court of Appeals in *Artrip* v. *State,* 136 So. 2d 574 (Ct. App. Ala. 1962), reads in a similar vein. The court felt the following pertinent to its conclusion that petitioner was not prejudiced by denial of his request for counsel in a prosecution for escaping from the penitentiary:

> "Artrip was considered a good all round mechanic and electrician by his supervisor at the Kilby motor pool. His original brief was well typed and concisely stated a number of pertinent points. His supplemental briefs which exhibit good penmanship are also pertinent to the contentions he advances." *Id.* at 576.

Contrast with the foregoing cases the opinions of this Court in *Carnley* v. *Cochran,* 369 U.S. 506 (1962);

Chewning v. *Cunningham,* 368 U.S. 443 (1962); and *McNeal* v. *Culver,* 365 U.S. 109 (1961).

3. There is an inherent incongruity in the "special circumstances" test. The rule is invoked primarily after trial in connection with an appeal or a petition for habeas corpus. A defendant, who had no counsel at trial, must file a petition, without the assistance of counsel, alleging that he was denied due process by reason of the refusal to appoint counsel. We submit that it is highly unlikely that a layman knows what constitutes "special circumstances" within the meaning of the rule in *Betts* v. *Brady,* or that he has sufficient technical competence to allege these matters. If the accused lacked funds to retain counsel to defend him at trial, he will be unable to afford counsel once he is in prison. Thus, the factors which would justify invalidating the conviction may not be brought to the attention of the appellate court.

Even in the unlikely event that the accused has the assistance of counsel in preparing the documents on appeal, the prejudicial factors may not be adduced for the reason that the record does not reveal the "special circumstances." For example, the accused may be mentally retarded or mentally ill, but that fact may not be reflected in the record, although it would be a decisive factor under the rule of *Betts* v. *Brady.* See *McNeal* v. *Culver,* 365 U.S. 109 (1961); *Massey* v. *Moore,* 348 U.S. 105 (1954).

Denied qualified professional assistance at trial, the accused, confined in prison, tends to turn for legal advice to "jailhouse lawyers." The volume of post-conviction petitions in this and other courts and the assertion of important constitutional rights are thus

left, we surmise, largely to untrained, unqualified prisoners. Cf. *Schware* v. *Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring). It is ironic, but we believe true, that in final analysis, whether a post-conviction petition is filed, or whether a poverty-ridden prisoner gets a hearing on his right to counsel, may turn upon the quality of the fellow-inmate—usually equally untrained—who is the jailhouse lawyer.

4. The essentially post-trial character of the "special circumstances" rule is unfair to defendants in another respect: The accused may languish in prison for years before his conviction is adjudged to have been unfair by reason of the absence of counsel. The defendant in *Moore* v. *Michigan,* 355 U.S. 155 (1957), was sentenced in 1938 to "solitary confinement at hard labor for life"; in December, 1957, some 19 years later, this Court ruled that he had been denied his constitutional right to legal assistance. The lapse of time between trial and reversal for want of counsel was 15 years in *DeMeerleer* v. *Michigan,* 329 U.S. 663 (1947), and in *United States ex rel. Stoner* v. *Randolph,* 165 F. Supp. 284 (E.D. Ill. 1958); 14 years in *Garton* v. *Tinsley,* 171 F. Supp. 387 (D. Colo. 1959); and 10 years in *Uveges* v. *Pennsylvania,* 335 U.S. 437 (1948).

Indeed, a defendant may serve his entire sentence protesting throughout that his conviction is invalid by reason of the denial of counsel, and the case may be mooted before the wrong can be corrected. See *Parker* v. *Ellis,* 362 U.S. 574 (1960), writ of certiorari dismissed as moot, where four members of this Court agreed that the defendant "was convicted of a felony in flagrant disregard of his constitutional right to as-

sistance of counsel" after a trial characterized as a "sham." *Id.* at 577-578 (Warren, C. J., dissenting).

5. The long periods of delay associated with *Betts* v. *Brady* are undesirable for the state as well as for the defendant. If the conviction is invalidated it may be difficult, if not impossible, to conduct a new trial years later. Witnesses may have died; records may have been lost; memories will have faded. In short, we respectfully submit that it is to the advantage of the state, as well as to the defendant, to furnish counsel to indigent persons at all trials for serious offenses.

IV. THE RIGHT TO COUNSEL MINIMALLY INCLUDES APPOINTMENT OF AN ATTORNEY TO ASSIST AN INDIGENT PERSON AT THE TRIAL OF A SERIOUS OFFENSE

It is, of course, unnecessary in deciding the present case to delineate all of the metes and bounds of the right to counsel in state criminal proceedings. This case involves the right of an accused to legal assistance at the trial stage of the prosecution. Whatever the perimeter of the right, it surely comprehends the assignment of counsel at the trial on the merits.

We believe the right of indigents to legal assistance should be commensurate with that of persons who have means to employ counsel. An accused person who desires to consult an attorney should have the right to do so at any time immediately after arrest.[42] Indeed, "there is a strong argument that the time a defendant

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[42] The District of Columbia Legal Aid Act provides that the court "will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable." D. C. Code Anno. § 2-2202 (1961 ed.). See also Beaney, *Right to Counsel Before Arraignment,* 45 Minn. L. Rev. 771, 780-81 (1961); *Crooker* v. *California,* 357 U.S. 433, 448 (1958) (Douglas, J., dissenting); *White* v. *Maryland,* No. 600 Misc., Oct. Term, 1962 (pet. for cert. granted, Nov. 19, 1962).

needs counsel most is immediately after his arrest and until trial." Ass'n. of Bar of City of New York, et al., *Equal Justice for the Accused* 60 (1959). In any event, counsel should be furnished to destitute defendants at the same point in time at which an accused person with funds would be entitled under the 14th Amendment to consult an attorney.[43]

V. THE PRACTICAL IMPLICATIONS WITH RESPECT TO PERSONS ALREADY IMPRISONED DO NOT MILITATE AGAINST OVERRULING BETTS v. BRADY

Finally, a word should be said about the contention that *Betts* v. *Brady* should not be overruled because it may result in releasing indeterminate numbers of prisoners in some states. See *Foster* v. *Illinois,* 332 U.S. 134, 139 (1947).

First, it must be noted that a defendant who obtains a reversal of his conviction may be retried for the offense of which he was convicted. See *Green* v. *United States,* 355 U.S. 184, 189 (1957); *id.* at 219 (Frankfurter, J., dissenting). Moreover, it is possible that an even more severe sentence than that originally levied may be imposed at the conclusion of the second trial. See *Robinson* v. *Johnston,* 50 F. Supp. 774 (N.D. Cal. 1943); *Robinson* v. *United States,* 324 U.S. 282 (1945) (defendant sentenced to life imprisonment suc-

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[43] With respect to the scope of the right, it is pertinent to note that the 6th Amendment reads, in part, that "*In all criminal prosecutions,* the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense." (emphasis supplied) This Court has held that the right to trial by jury secured by this provision does not extend to "petty" offenses. *District of Columbia* v. *Clawans,* 300 U.S. 617 (1937); see Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 Harv. L. Rev. 917 (1926); 18 U.S.C. § 1.

cessfully attacked conviction for failure to appoint counsel; following retrial, he was sentenced to death for the same offense).[44]

Second, the claim that some offenders would go free was urged in opposition to the decisions in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and *Griffin* v. *Illinois,* 351 U.S. 12 (1956). In both cases, this Court brushed aside that consideration. The practical implications of the ruling in *Mapp* are in some respects more drastic than the ruling sought here. As a consequence of *Mapp,* illegally obtained evidence cannot be used; the prosecution may be completely disarmed. But no comparable handicap will be imposed upon the prosecution by reversal of *Betts* v. *Brady.* Further, the claims of the Petitioner here are stronger than those of the petitioner in *Griffin. Griffin* involved the rights of a *convicted person* seeking equality of treatment in connection with an appeal; as the Court pointed out in that case, there is no constitutional right to an appeal. 351 U.S. at 18. The present case, however, involves the rights of persons presumed to be innocent who are seeking meaningful protection of their right to a fair trial, a right which *is* safeguarded by the Constitution.

Thirty years have passed since the Court, in *Powell* v. *Alabama, supra,* spoke of the necessity for appointment of counsel by the states. The states have had adequate notice and ample time to conform their practice to the requirements of a constitutional imperative. As Mr. Justice Clark stated in *Mapp* v. *Ohio, supra,* "further delay in reaching the present

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[44] The sentence was subsequently commuted. See note, Hall and Glueck, *Cases on Criminal Law and Its Enforcement* 604 (1958).

result could have no effect other than to compound the difficulties" in the future. 367 U.S. at 659, n. 9.[45]

CONCLUSION

In 1942, shortly after *Betts* v. *Brady* was announced, the present Dean of the Harvard Law School, Erwin N. Griswold, and Benjamin Cohen, Esquire, expressed their protest against that decision in words which, we feel, have been underscored by the passage of time:

> "[A]t a critical period in world history, *Betts* v. *Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right of counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law." (N.Y. Times, Aug. 2, 1942, §IV, p. 6, col. 5, quoted in *Bute* v. *Illinois,* 333 U.S. 640, 677, n. 1 (1948) (Douglas, J., dissenting)).

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[45] It has been suggested that a decision overruling a point of constitutional law should be given only prospective effect in certain instances. See *Griffin* v. *Illinois,* 351 U.S. 12, 25-26 (1956) (Frankfurter, J., concurring). We do not advocate that result. We respectfully submit that it would blur the distinction between the legislative and judicial functions and that it would present substantial questions in connection with the requirement of U.S. Const., Art. III, § 2, that this Court sits to decide "cases" and "controversies."

The ruling in *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), was given retroactive effect. See *Robinson* v. *Johnston,* 50 F. Supp. 774 (N.D. Cal. 1943). Similarly, in *Eskridge* v. *Washington Prison Bd.,* 357 U.S. 214 (1958), this Court held that the principle of *Griffin* v. *Illinois, supra,* decided in 1956, was applicable to a 1935 conviction.

For the reasons stated, *Betts* v. *Brady* should be overruled, and the judgment of the Court below should be reversed.

Respectfully submitted,

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* Counsel for Petitioner wishes to acknowledge the valuable assistance rendered in connection with this brief by John Hart Ely, a third year student at the Yale Law School, New Haven, Connecticut.

APPENDIX A

Constitutional Provisions and Statutes Involved

U. S. Const., Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes, Section 810.05 (1961):

> "Whoever breaks and enters or enters without breaking any dwelling or store house, or any building, ship, vessel, or railroad car with intent to commit a misdemeanor, shall be punished by imprisonment in the state prison or county jail not exceeding five years, or by fine not exceeding five hundred dollars."

Florida Constitution, Declaration of Rights, Section 11:

> "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

Florida Statutes, Section 909.21 (1961):

> "In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant

as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable, for any reason, to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by this section, such counsel shall file a written report as to the duties performed by him and apply for discharge by the court.

"The compensation of counsel for the defendant, at the trial, shall not exceed five hundred dollars; and defendant's counsel's compensation on appeal, shall not exceed five hundred dollars additional."

APPENDIX B

In the Present Case, Petitioner Did Not Receive the Benefits and Protection Which Would Have Been Afforded Him By Counsel

The present case discloses the following specific consequences of the denial of counsel:

1. The offense of breaking and entering with intent to commit a misdemeanor raises a number of subtle and complex questions which were not explored at the trial. See *McNair* v. *State,* 61 Fla. 35, 55 So. 401 (1911). The trial judge did not explain the elements of the offense to the jury; he merely paraphrased the charge set out in the information (R. 43; see R. 1).

An individual may be so intoxicated as to negative the intent requisite for a conviction of this offense. *Jenkins*

v. *State,* 58 Fla. 62, 66, 50 So. 582, 583 (1909). The principal witness for the state, who stated that he saw Gideon leave the Bay Harbor Poolroom at 5:30 a.m., testified that Gideon "acted kinder drunk" (R. 21). However, the jury was not instructed with respect to the implications of intoxication as a defense.

The accused was not informed of his right to make requests concerning the charge and to be advised of the court's rulings with respect to the requests before final argument.

2. In connection with the *voir dire,* the trial judge advised Gideon that all or any one of the jurors could be excused "if you don't like their looks" (R. 11), but he did not advise Gideon of his right to examine the prospective jurors individually or of his right to object to a juror for cause. See *Carnley* v. *Cochran,* 369 U.S. 506 (1962) (Douglas, J., concurring).

3. The judge improperly cut off cross-examination in several instances. Thus, he did not permit Gideon to inquire into the proprietor's pattern of conduct in locking the building (R. 15), an inquiry which the Florida Supreme Court has held to be proper in a prosecution for this offense. *Adkinson* v. *State,* 48 Fla. 1, 37 So. 522 (1904).

4. No objection was interposed in behalf of the defendant to opinion and hearsay testimony. See e.g., R. 14, A-6; R. 23, A-2.

5. The record shows that after the verdict was returned "Imposition of sentence was withheld pending receipt of an investigative report of defendant's past history." (R. 4.) Three weeks later, the defendant, "having nothing to say," was sentenced to the maximum prison term authorized by the governing statute, a term of five years (R. 5). No plea was apparently made against imposition of the maximum penalty.

APPENDIX C

The Court-Martial Cases and Rejection of the Distinction Between Capital and Non-Capital Offenses As a Constitutional Standard In Those Cases

In the October Term, 1955, this Court held that civilian dependents of American servicemen could constitutionally be tried by a military court-martial in a foreign country for an offense committed in that country. *Kinsella* v. *Krueger,* 351 U.S. 470 (1956); *Reid* v. *Covert,* 351 U.S. 487 (1956). Each of these cases involved a charge of premeditated murder, an offense punishable by death. The Court, in an opinion by Mr. Justice Clark, rejected the contention that trial by court-martial in these circumstances violated Art. III, § 2, and the Sixth Amendment, particularly the guarantee of the right to trial by jury. Mr. Justice Frankfurter reserved the expression of his views (351 U.S. at 481, 492). The Chief Justice and Mr. Justice Black and Mr. Justice Douglas dissented and indicated they would file a statement of their views the following term (351 U.S. at 486, 492).

Subsequently, the Court granted a petition for rehearing, and after further argument the previously rendered decisions were set aside on the grounds that the petitioners could not constitutionally be tried by military authorities. *Reid* v. *Covert,* 354 U.S. 1 (1957). Mr. Justice Black, in an opinion in which the Chief Justice and Justices Douglas and Brennan concurred, concluded that the court-martial proceedings did not satisfy the constitutional guarantee of trial by jury in a court of law and in accord with traditional modes of procedure after an indictment by a grand jury. The Court held that the power of Congress under Art. I, § 8, cl. 14, "To make Rules for the Government and Regulation of the land and naval Forces" did not extend to persons of petitioners' status, that is, to civilian dependents.

Mr. Justice Frankfurter, concurring in a separate opinion, "conclude[d] that in capital cases, the exercise of

court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments." 354 U.S. at 49. Mr. Justice Harlan also concurred separately "on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace." 354 U.S. at 65. He alluded specifically to *Betts* v. *Brady* and the cases relating to the right to counsel under the 14th Amendment in support of the position that "run of the mill offenses" should be treated differently from capital cases. *Id.* at 75, 77.

Mr. Justice Clark dissented in an opinion which Mr. Justice Burton joined (354 U.S. at 78). They were of the view that trial by court-martial in the circumstances presented was reasonably related to Congressional power over the land and naval forces under Art. I, § 8, cl. 14. The dissenting Justices could "find no distinction in the Constitution between capital and other cases," and they pointed out that "at argument all parties admitted there could be no valid difference." 354 U.S. at 89.

Mr. Justice Whittaker did not participate in the decision.

Three years later, in *Kinsella* v. *United States ex rel Singleton,* 361 U.S. 234 (1960), the Court held that the decision in *Reid* v. *Covert,* 354 U.S. 1 (1957), was applicable to non-capital crimes as well as to capital offenses, that is, civilian dependents can not be tried by court-martial. Mr. Justice Clark, who had dissented in *Reid* v. *Covert,* wrote the opinion of the Court and spoke for the Chief Justice, Justices Black, Douglas, Brennan, and himself. The Court rejected the contention that constitutional and practical considerations justified different treatment of offenders charged with non-capital offenses. Mr. Justice Whittaker, with whom Mr. Justice Stewart joined, concurred in the judgment with respect to dependents of servicemen (as

distinguished from civilians employed by the military). They stated that they could "see no constitutional distinction between Congress' power to provide for the court-martial punishment of capital offenses, on the one hand, and non-capital offenses on the other hand . . ." 361 U.S. at 264. Justice Harlan, joined by Justice Frankfurter, dissented on the grounds that non-capital offenses were involved.

Seven Justices of the Court, in these cases, thus rejected the difference between capital and non-capital offenses as controlling in relation to rights protected by Article III and the Fifth and Sixth Amendments.