RESPONSE TO PETITION FOR WRIT OF CERTIORARI

On October 11, 1961, Clarence Earl Gideon filed a petition for writ of habeas corpus in the Supreme Court of Florida, alleging substantially as follows:

1. That he was arrested on June 3, 1961, and charged with the crime of breaking and entering with intent to commit misdemeanor.

2. That he plead not guilty and was tried and convicted in the Circuit Court in and for Bay County, Florida, on August 4, 1961.

3. That he was sentenced on August 25, 1961, to a term of five years in the State Prison.

4. That at the time of trial he was without funds and without an attorney.

5. That the trial court failed to appoint counsel for him upon request, thereby abridging his rights under the United States Constitution.

6. That he "sent a petition from the County Jail of Bay County to the United States District Court at Tallahassee, Florida", but that the "sheriff's office and offic(i)als refuse(d) to let it go out". (Parentheses ours) [sic]

True and accurate certified copies of the petition, and the envelope in which it was mailed to the Clerk of the Florida Supreme Court are attached hereto.

The Supreme Court of Florida denied the petition for habeas corpus on October 30, 1961.

In the case of *Powell* v. *Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S.Ct. 55 (1932) this Court held that in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

In *Betts* v. *Brady*, 316 U.S. 455, 86 L.Ed. 1595, 62 S.Ct. 252 (1942) it was held that although a denial by a state of rights or privileges specifically embodied in the Sixth Amendment to the United States Constitution may, in certain circumstances, or in connection with other elements, operate in a given case, to deprive a defendant of due process of law in violation of the Fourteenth Amendment it cannot be said that the due process clause of the Fourteenth Amendment incorporates, as such, the specific guarantees found in the Sixth Amendment. As pointed out in that decision, due process of the Fourteenth Amendment formulates a concept less rigid and more fluid than those envisaged in other specific and particular privileges of the Bill of Rights. We quote from the decision:

> "Its [The Fourteenth Amendment's] application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

In the *Betts* case, the conviction of the State Court was affirmed. The crime was robbery and the accused was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests in that particular instance, since the issue was simply the veracity of the testimony for the State and that for the defendant. It was also pointed out that the accused was not wholly unfamiliar with criminal procedure. Under such circumstances it could not be said that his trial by the Judge upon a plea of not guilty, resulting in a sentence of eight years, was lacking in the common and fundamental ideas of fairness and right embodied in the due process clause of the Fourteenth Amendment.

The interpretation of the Fourteenth Amendment as enunciated by this Court in *Betts* v. *Brady, supra*, was applied to a case involving a jury trial, in *Gallegos* v. *Nebraska*, 342 U.S. 55, 96 L.Ed. 86, 72 S.Ct. 141 (1951). In affirming a conviction and ten-year sentence for the crime of manslaughter committed by a thirty-eight year old Mexican farmhand, who could neither speak nor write English, the Court, speaking through Mr. Justice Reed, said:

> The Federal Constitution does not command a state to furnish defendants counsel as a matter of course, as is required by the Sixth Amendment in federal prosecutions. Lack of counsel at state noncapital trials denies federal constitutional protection only when the absence results in a denial to accused of the essentials of justice.

A thorough discussion concerning the nature and extent of the right to counsel as embodied in the Fourteenth Amendment is found in Mr. Justice Burton's majority opinion in *Bute* v. *Illinois*, 333 U.S. 640, 92 L.Ed. 986, 68 S.Ct. 763 (1948). There the petitioner pleaded guilty to two charges of the crime of taking indecent liberties with children and on each charge was sentenced to the mandatory term of not less than one nor more than twenty years, the

sentences to run consecutively. Nothing in the record or the petition disclosed any affirmative basis for invalidating the sentences. In the majority opinion it was pointed out that the due process clause of the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the States for their control over the procedure to be followed in criminal trials in their respective courts. Citing *Foster* v. *Illinois*, 332 U.S. 134, 91 L.Ed. 1955, 67 S.Ct. 1716 (1947), Mr. Justice Burton said that, although failure to assign counsel to assist an accused in his defense in a federal court for a noncapital crime might violate the express provisions of the Sixth Amendment, that does not mean that the like failure to do in a state prosecution for a noncapital felony will violate due process of law under the Fourteenth Amendment. The accused does have a right to the assistance of counsel for his defense when there are special circumstances showing that, otherwise, the defense would not enjoy that fair notice and adequate hearing which constitute the foundation of due process of law in the trial of any criminal charge. The Court pointed out that any doubts as to the regularity of the trial proceedings should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the State Attorney, and that if any presumption is to be indulged it should be one of regularity rather than that of irregularity. Since Bute had made no affirmative showing of exceptional circumstances such as would amount to a violation of due process under the Fourteenth Amendment, his convictions were confirmed.

At 3 A.L.R. 2d 1076, there is a list of the chief factors of due process appearing from the decisions of this Court involving the right to counsel under the Fourteenth Amendment in noncapital felony cases. Those items listed include:

> (1) gravity of the offense charged, i.e., whether capital or noncapital, (2) nature of the issues, i.e., whether simple or

> complex, (3) age of the accused, (4) mental capacity of the accused, (5) background and conduct of the accused, including amount of education and experience, (6) the accused's knowledge of the law and court procedure, including knowledge thereof presumably gained from previous prosecutions, and (7) policy of the state as to appointment of counsel and the degree of protection given the accused during the trial.

Cases involving the right to counsel in which convictions of state courts were affirmed include the *Betts, Gallegos, Bute* and *Foster* decisions, *supra*. The facts of the first three cases have already been discussed. Betts was a forty-three year old man of "little education" (86 L.Ed. at 1608), but ordinary intelligence who was convicted on an uncomplicated robbery charge. It was pointed out that he was somewhat familiar with criminal procedure. Gallegos was a thirty-eight year old Mexican farmhand who could neither speak nor write English. His conviction for manslaughter was upheld even though he lacked education and familiarity with our law. Bute was fifty-seven years of age at the time he was convicted on two charges of taking indecent liberties with children, each of which involved a mandatory one to twenty year sentence.

The *Foster* case, *supra*, involved two petitioners who had been thirty-four and forty-eight years of age at the time they had entered pleas of guilty to charges of burglary and larceny. The convictions were affirmed because there was "neither proof nor uncontradicted allegation of any ... miscarriage of justice in accepting pleas of guilty ...". Mr. Justice Frankfurter pointed out that:

> [I]n the circumstances of a 'particular situation,' assignment of counsel may be 'essential to the substance of a hearing' as part of the due process which the Fourteenth Amendment exacts from a

> State which imposes sentence . . . . [Also] Such need may exist whether an accused contests a charge against him or pleads guilty . . .

The petitioner in *Quicksall* v. *Michigan*, 339 U.S. 660, 94 L.Ed. 1188, 70 S.Ct. 191 (1950) was convicted of first degree murder in a state which had abolished capital punishment. He was forty-four years old at the time, and had prior experience in court. This Court, again speaking through Mr. Justice Frankfurter, reiterated the rule that "[W]hen a crime subject to capital punishment is not involved, each case depends on its own facts . . .". It was also pointed out that:

> to invalidate a plea of guilty the prisoner must establish that 'for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement . . .'

Carter v. *Illinois*, 329 U.S. 173, 91 L.Ed. 172, 67 S.Ct. 216 (1946) involved a thirty year old Negro convicted of murder and sentenced to imprisonment for ninety-nine years. The trial judge did assign counsel when it came to sentencing, and petitioner alleged, on petition for certiorari, that this showed he was incapable of defending himself and entering his plea of guilty. It was pointed out that designation of counsel to assist the accused at the sentencing stage of the trial in no wise implies that the defendant was incapable of pleading guilty. The conviction was affirmed, primarily because there was nothing in the record showing what manner of man the defendant was. "Facts bearing on his maturity or capacity of comprehension, or on the circumstances under which a plea of guilty was tendered and accepted, are wholly wanting . . .". There was no showing by petitioner, of exceptional circumstances such as would entitle him to appointment of counsel.

In *Gryger* v. *Burke*, 334 U.S. 728, 92 L.Ed. 1683, 68 S.Ct. 1256 (1948) the petitioner complained of a life sentence

imposed under the Pennsylvania Habitual Criminal Act when he was thirty-four years old. He failed to show any exceptional circumstances requiring appointment of counsel, and for that reason his conviction was upheld.

Now, let us direct our attention to cases in which state court convictions were reversed, on the basis that the right to counsel under the Fourteenth Amendment had been infringed. In *Smith* v. *O'Grady*, 312 U.S. 329, 85 L.Ed. 859, 61 S.Ct. 572 (1941) due process was said to be lacking where an ignorant layman, supposing that he was charged with simple burglary, entered a plea of guilty upon the representation of the prosecuting attorney that if he would do so he would be leniently dealt with, and was sentenced to twenty years, when he learned for the first time that the charge against him was burglary with explosives, punishable by imprisonment up to life, after which he vainly requested that he be permitted to withdraw his plea of guilty.

The conviction in *DeMeerleer* v. *Michigan*, 329 U.S. 663, 91 L.Ed. 584, 67 S.Ct. 596 (1947) was reversed because the petitioner, when seventeen years of age, was confronted by a complex first degree murder charge, and on the same day was arraigned, tried, convicted and sentenced. He had never been advised of his right to counsel, and the record indicated considerable confusion existed in his mind at the time of arraignment as to the effect of his plea.

Two convictions and sentences of ten to twenty years each for the crimes of burglary and robbery were reversed by this Court, in the case of *Townsend* v. *Burke*, 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948), where the record indicated foul play, carelessness and facetiousness on the part of the trial court. In *Uveges* v. *Pennsylvania*, 335 U.S. 437, 93 L.Ed. 127, 69 S.Ct. 184 (1948) the petitioner had been sentenced to a term of twenty to forty years pursuant to pleas of guilty to four indictments charging burglary. At the time, he had been only seventeen years old. The convictions were reversed, for "Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to

crimes which carried a maximum sentence of eighty years..." Also, there was an undenied allegation that he was never advised of his right to counsel, and the record showed that there had been no attempt on the part of the court to make him understand the consequences of his plea.

This Court, in *Gibbs* v. *Burke*, 337 U.S. 773, 93 L.Ed. 1686, 69 S.Ct. 1247 (1949) reversed a conviction and a two and one-half to five year sentence for the crime of larceny committed by the petitioner when thirty-four years of age, for the reason that no adequate judicial guidance or protection had been furnished at the trial. Evidently, the trial judge had exhibited a hostile attitude toward the defendant. A state court conviction for armed robbery when the petitioner was twenty-one years old, was reversed by this Court upon showing of a history of mental abnormality, indicating that petitioner was incapable of protecting himself in court, in *Palmer* v. *Ashe*, 342 U.S. 134, 96 L.Ed. 154, 72 S.Ct. 191 (1951). The petitioner in that case had also alleged that police officers had deceived him into pleading guilty to armed robbery instead of breaking and entering.

Cash v. *Culver*, 358 U.S. 633, 3 L.Ed. 2d 557, 79 S.Ct. 432 (1959) involved an uneducated farm boy of twenty who had been convicted by a jury and sentenced to a fifteen year prison term for the crime of burglary. His conviction was reversed by this Court, but primarily upon the ground that the trial judge denied a request for time to obtain a lawyer, even though petitioner had learned only a few days prior to trial, that his prior lawyer had suddenly withdrawn from the case.

A conviction and twenty-year sentence for the crime of "assault to murder in the second degree" was recently reversed by this Court upon a showing by petitioner that he had been an ignorant, mentally ill, twenty-nine year old Negro at the time of trial, completely unfamiliar with the law and court procedure, faced with a number of highly complex legal questions, beyond the comprehension of almost any layman. *McNeal* v. *Culver*, 365 U.S. 109, 5 L.Ed.

2d 445, 81 S.Ct. 413 (1961). In *Reynolds* v. *Cochran*, 365 U.S. 525, 5 L.Ed. 2d 754, 81 S.Ct. 723, a conviction under the Florida multiple-offender statute was reversed, primarily because petitioner's allegations that the trial judge said counsel would be of no assistance and "No point in calling a doctor to a man already dead . . ." had to be taken as true, since the Florida Court had dismissed the petition for habeas corpus presented to it without a hearing.

This Court held in *Hamilton* v. *Alabama*, __U.S.__, 7 L.Ed. 2d 114, 82 S.Ct. ____, that an accused in a capital case in a state court is entitled to court-appointed counsel at arraignment. A defendant charged with being a habitual criminal should have court-appointed counsel where the issues presented under the habitual criminal statute are complex, and the potential prejudice resulting from absence of counsel are great. *Chewning* v. *Cunningham*, __U.S.__, 7 L.Ed. 2d 442, 82 S.Ct. __.

Petitioner Gideon has made no affirmative showing of any exceptional circumstances which would entitle him to counsel under the Fourteenth Amendment. As in the *Carter* case, *supra*, there has been presented no evidence of petitioner's maturity or capacity of comprehension. Petitioner merely alleges that he was without funds, that he pleaded not guilty and that he requested court appointed counsel, while being tried on a noncapital charge. The petition contains no allegations as to petitioner's age, experience, mental capacity, familiarity or unfamiliarity with court procedure, or as to the complexity of the legal issues presented by the charge. Petitioner has made no showing of unfairness or of a lack of fundamental justice in the trial proceedings. In fact, his petition is notable for its lack of material allegations such as would entitle him to counsel under the Fourteenth Amendment. Since there have been no allegations as to exceptional circumstances, the presumption must be indulged that the trial proceedings were fair and just. (*See Bute* v. *Illinois*, *Carter* v. *Illinois*, and *Gryger* v. *Burke, supra.*)

Each of the cases, above discussed, in which convictions of state courts were reversed, involved one or more circumstances indicating unusual unfairness, such as deception by police officials, hostility of the judge, mental illness or weakness, lack of experience, ignorance of the law, or complexity of the charge. None of these exceptional circumstances were alleged by petitioner, and for that reason his petition for writ of certiorari should be denied.

State prison authorities, enforcing prison rules, violate the equal protection clause of the Fourteenth Amendment if they physically prevent a prisoner from sending out appeal documents until it is too late to take an appeal. *Cochran* v. *Kansas*, 316 U.S. 255, 86 L.Ed. 1453, 62 S.Ct. 1068; *Dowd* v. *United States*, 340 U.S. 206, 95 L.Ed. 215, 71 S.Ct. 262, 19 A.L.R. 2d 784. The equal protection and due process clauses of the Fourteenth Amendment are violated when state action constitutes a denial of full appellate review to an indigent defendant solely because of his inability to pay for a transcript, while granting such review to all other defendants (*Griffin* v. *Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585, 55 A.L.R. 2d 1055; *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 2 L.Ed. 2d 1269, 78 S.Ct. 1061), or because of his inability to pay filing or docket fees. (*Burns* v. *Ohio*, 360 U.S. 252, 3 L.Ed. 2d 1209, 79 S.Ct. 1164; *Douglas* v. *Green*, 363 U.S. 192, 4 L.Ed. 2d 1142, 80 S.Ct. 1048). Also, when the right to habeas corpus is granted by a state, financial hurdles must not be permitted to condition its exercise. *Smith* v. *Bennett*, ____U.S.____, 6 L.Ed. 2d 39, 81 S.Ct. ____.

The petition for writ of habeas corpus filed in the Florida Supreme Court on October 11, 1961, alleged that while incarcerated in the Bay County Jail petitioner was prevented from sending a "petition" to the United States District Court. This allegation clearly does not entitle him to relief

under any of the authorities cited in the preceding paragraph. He does not claim that his financial status made it impossible for him to appeal or petition for writ of habeas corpus, and he does not contend that he was prevented from sending out appeal documents for filing.

If jailers or prison officials physically prevent a prisoner from mailing out documents until the statutory appeal period has run, he has been seriously prejudiced, in that he has forever lost the right to raise many questions, such as sufficiency of the evidence, which cannot be considered in habeas corpus proceedings. In such case, the doctrine of *Cochran* v. *Kansas, supra*, would be applicable. If, however, a prisoner is temporarily prevented from mailing out a habeas corpus petition, he is not permanently injured or prejudiced, since in Florida, there is no statutory limit on the time period within which habeas corpus must be utilized. The grounds for habeas corpus which were available to petitioner while he was incarcerated in the County Jail were available to him when he filed his petition with the Florida Supreme Court, and any grounds which were not raised in that Court, not being *res adjudicata*, are and will be available to him for as long as he is imprisoned under his present commitment.

It must also be pointed out that, even if petitioner had been allowed to mail his petition to the U.S. District Court in Tallahassee, said petition could not have been considered until he had exhausted his state remedies. *White* v. *Ragen*, 324 U.S. 760, 89 L.Ed. 1348, 65 S.Ct. 978. (*See also* 8 U.S. Supreme Court Digest, Habeas Corpus, §14.5).

Under Florida Statute 924.09, an appeal must be taken by the defendant within 90 days from the rendition of the judgment, sentence, or order appealed from. The postmark on the envelope in which petitioner mailed his petition for habeas corpus to the Florida Supreme Court shows that it was mailed on October 10, 1961. The petition was filed on October 11. Both of these dates are well within the 90-day period during which petitioner was entitled to appeal. He

could certainly have filed a notice of appeal as easily as a petition for habeas corpus, and therefore his right to appeal cannot be said to have been abridged.

On the basis of the authorities cited, and arguments presented, it is respectfully urged that the petition for writ of certiorari, previously filed in this cause, be denied.

Respectfully submitted,

/s/

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