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Constitutional Law - Criminal Law - Right to Counsel at Probation Revocation Hearings - Mempa v. Rhay, 389 U.S. 128 (1967)

ever, was expected.[29] It was demanded by *Baggett* and *Elfbrandt*.

In the case at bar, the Court impliedly conceded that the specific oath was not invalid for vagueness. Thus, while striking down the pertinent provisions of the Ober Act, it has answered its own demand that legislation authorizing loyalty oaths be narrowly drawn. That answer is for state legislatures to conform their loyalty statutes and oaths to the express provisions of the *Whitehill* oath.

Constitutional Law—Criminal Law—RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS. On June 17, 1959, petitioner Mempa, following a plea of guilty in the Spokane County Superior Court, was convicted of larceny of an automobile[1] and placed on probation with the imposition of sentence deferred.[2] Five months later a probation revocation hearing was held pursuant to an allegation by the Spokane County prosecuting attorney that Mempa had been involved in a burglary on September 15, 1959. At this hearing Mempa, then 17, was not represented by counsel nor was inquiry made by the court as to whether the defendant desired assistance of counsel. When questioned by the court, Mempa affirmed his complicity in the burglary. The hearing was immediately terminated and the court revoked the defendant's probation, imposing sentence of ten years in the penitentiary[3] with the recommendation that the sentence be reduced to one year.[4] In 1966, Mempa filed a petition on his own behalf for a writ of habeas corpus claiming that he had been denied right to counsel at the probation revocation hearing. The Washington State Supreme Court dismissed the petition[5] and the United States Supreme Court granted certiorari.[6] In its decision,[7] the Court reversed, holding that the presence of counsel is necessary in probation revocation or deferred sentencing hearings.

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decisions the oaths expressly or by implication included the statutory terms of the enabling acts.

29. "If *Gerende* is ripe for final dispatch, the task is for the Supreme Court, not a subordinate court." Whitehill v. Elkins, 258 F. Supp. 589, 598 (D. Md. 1966). *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967) overruling *Adler*.

1. WASH. REV. CODE § 9.54.020 (1961).
2. WASH. REV. CODE § 9.95.200 (1961).
3. WASH. REV. CODE § 9.95.010 (1961).
4. WASH. REV. CODE § 9.95.030 (1961).
5. Mempa v. Rhay, 68 Wash. 2nd 882, 416 P. 2nd 104 (1966).
6. Mempa v. Rhay, 386 U.S. 907 (1967).
7. Mempa v. Rhay, 389 U.S. 128 (1967).

The right of a defendant in criminal proceedings to be represented by counsel has developed from the singular application in the federal jurisdictions as a result of the sixth amendment[8] to the all pervasive application in State criminal proceedings through the equal protection provisions of the fourteenth amendment.[9] The first direct correlation by the United States Supreme Court of the due process standard on a State's interpretation of the right to counsel occured in *Powell v. Alabama*.[10] Required by Alabama statute to appoint counsel for defendants in all capital cases, the trial court appointed all the members of the local bar to assist in the preparation of the defense of an unpopular cause and, if no single counsel appeared for the defendants, to continue the defense through the trial. In its decision the Supreme Court noted the special circumstances[11] surrounding the trial and concluded that the collective appointment of all the local lawyers was, in actuality, the appointment of no one and the "defendants were not accorded the right of counsel in any substantial sense." [12] From the wording of the *Powell* decision it is clear that, while not doubting the need for counsel in the particular case, the Court was evaluating the effectiveness of the appointed counsel and was not establishing the right of a criminal defendant in state proceedings to the assistance of counsel.[13]

In decisions following *Powell*, the Supreme Court's approach to a defendant's right to counsel in state criminal proceedings emphasized either the particular procedures of the jurisdiction[14] or the special cir-

8. U.S. CONST. amend. VI.

9. U.S. CONST. amend. XIV.

10. Powell v. Alabama, 287 U.S. 45 (1932).

11. "In the light of the facts outlined in the forefront of this opinion—the ignorance of and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process." 287 U.S. at 71.

12. 287 U.S. at 58.

13. "Whether this [denial of due process] would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to obtain counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, 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." 287 U.S. at 71.

14. Williams v. Kaiser, 323 U.S. 471 (1944); Gibbs v. Burke, 337 U.S. 773 (1949); Cash v. Culver, 358 U.S. 633 (1959); Huson v. North Carolina, 365 U.S. 697 (1960); Chewning v. Cunningham, 368 U.S. 443 (1962).

cumstances of the case.[15] The concept of due process in state criminal proceedings was governed by the subjective standard of what would "constitute a denial of fundamental fairness, shocking to the universal sense of justice" [16] in the absence of direct application of the fourteenth amendment. That the sixth amendment had no application to the states through the fourteenth amendment was confirmed by the decision of the Court in *Betts v. Brady*.[17] In handing down that decision Mr. Justice Roberts, after presenting a comprehensive survey of state treatment of the criminal defendant's right to counsel,[18] grounded his opinion on the importance of evaluating the special circumstances in each case, and rejected any requirement that counsel be present to ensure due process in all criminal proceedings.[19]

Even as the Court held that the sixth amendment was not obligatory on the states it continued to recognize that there could be instances where the denial of counsel worked a denial of due process to the defendant.[20] Examples of such circumstances were not limited to a trial on the merits but included such collateral proceedings as pleading during arraignment,[21] a hearing to determine the degree of a crime to which a guilty plea had been entered[22] and sentencing after a plea of guilty;[23] in all such cases the decision upholding the right to counsel turned on the procedural consequences of the unknowing defendant's actions. As the exceptions to the *Betts v. Brady* rule continued to expand, the value of the rule as an aid to the prosecution was lost and it

15. DeMeerleer v. Michigan, 329 U.S. 663 (1947); Wade v. Mayo, 334 U.S. 672 (1948); Townsend v. Burke, 334 U.S. 736 (1948); Uveges v. Pennsylvania, 335 U.S. 437 (1948).

16. "Asserted denial [of due process] is to be tested by an appraisal of the totality of the 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 a denial." Betts v. Brady, 316 U.S. 455, 462 (1942).

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

18. "This material demonstrates that, in the great majority of the states, it has been the considered judgment of the people, their representatives and the courts that appointment of counsel is not a fundamental right, essential to fair trial. On the contrary, the matter has generally been deemed one of legislative policy." 316 U.S. at 471.

19. "To deduce from the due process clause a rule binding upon the states in this matter would be to impose upon them . . . a requirement without distinction between charges of different magnitude or in respect of courts of varying jurisdiction." 316 U.S. at 473.

20. See footnotes 14, 15 *supra*.

21. Hamilton v. Alabama, 368 U.S. 52 (1961).

22. Moore v. Michigan, 355 U.S. 155 (1957).

23. Townsend v. Burke, 334 U.S. 736 (1948).

became clear that, for a conviction to stand, the presence of counsel was necessary whenever the rights of the accused were threatened. With the decision in *Gideon v. Wainwright*,[24] *Betts v. Brady* was expressly overruled and the right to counsel was made a mandatory element of state criminal proceedings through the equal protection clause of the fourteenth amendment regardless of the circumstances of the case, the provisions of the state's legislation or the ability of the accused to obtain counsel.

While the decision in *Gideon* is aimed at providing the indigent defendant with counsel at his criminal trial the decisions during the reign of *Betts v. Brady* served to extend this unqualified right to assistance of counsel at "every stage of the criminal proceeding where substantial rights of the criminal accused may be affected." [25] Through this combination of judicial decisions and the application of the requirements of the sixth amendment, the scope of a criminal defendant's right to counsel does not begin and end with the trial on the merits but includes every stage of the judicial proceedings regardless of the presence of peculiar circumstances which may work to prejudice the accused.

In the present case, the defendant, while represented by counsel, pleaded guilty to larceny and was placed on probation without sentence being imposed. The State argued that, due to the requirement that the trial judge impose the maximum sentence for each conviction,[26] sentencing actually had occurred when the defendant had been placed on probation.[27] In rejecting this argument, the Supreme Court noted that, as a result of judicial interpretation, a Washington defendant can take an appeal from a plea of guilty followed by probation only after sentence is imposed following revocation of probation,[28] and that the original plea of guilty may be withdrawn at any time prior to the imposition of sentence.[29] In addition the Court noted that while the actual determination of the length of the sentence is made by the Board of Prison Terms and Paroles,[30] that body places great weight on the required recom-

24. Gideon v. Wainwright, 372 U.S. 335 (1963).

25. Mempa v. Rhay, 389 U.S. 128 (1967).

26. WASH. REV. CODE § 9.95.010 (1961).

27. Washington statute provides that the actual length of the sentence shall be determined by the Board of Prison Terms and Paroles following the incarceration of the prisoner. WASH. REV. CODE § 9.95.040 (1961).

28. State v. Farmer, 39 Wash. 2nd 675, 237 P.2nd 734 (1951), State v. Proctor, 68 Wash. 2nd 817, 415 P.2nd 634 (1966).

29. WASH. REV. CODE § 10.40.175 (1961).

30. WASH. REV. CODE § 9.95.040 (1961).

mendation compiled by the trial judge and the prosecuting attorney.[31] The importance to the defendant of being represented by counsel who has only his best interests in mind when such a recommendation is prepared can not be underestimated.

It is clear from the decision in the present case that the Supreme Court is extending the *Gideon* doctrine beyond the actual trial while looking for factors which *may* prejudice the rights of the accused absent the assistance of counsel. Such an approach will focus increased attention on the administration of State laws which affect the status of the defendant before[32] or after[33] his trial. If state criminal prosecutions are to remain free of the stigma of denial of due process not only must the accused have the assistance of counsel at his trial, but also he must have access to counsel both as the state prepares him for trial and until the court has actually sentenced him following conviction.

Federal Procedure—HABEAS CORPUS—THE PREMATURITY DOCTRINE. Prisoners Rowe[1] and Thacker,[2] while serving consecutive sentences, the second of which would not commence until the years 1993 and 1994 respectively, sought the remedy of habeas corpus to attack their future sentences on constitutional grounds. Rowe's scheduled eligibility for parole is in 1975 and would be advanced to 1971 if his second sentence were invalidated. Thacker becomes eligible for parole in 1976 without any possibility of parole advancement. Conceding that both petitioners

31. WASH. REV. CODE § 9.95.030 (1961).

32. An example would be a determination whether the defendant should be prosecuted as a juvenile.

33. Examples would be probation revocation hearings as in the present case, deferred sentencing as in the companion case—Walkling v. Washington State Board of Prison Terms and Paroles, 389 U.S. 128 (1967), or sentencing under a State Habitual Offender Act.

1. In 1963 Rowe was convicted of rape and sentenced to thirty years, then three days later arraigned for the felonious abduction of the same female. His plea of former jeopardy was overruled and upon advice from counsel he pleaded guilty. He was convicted of the second count and sentenced to twenty years, to run consecutively with the rape sentence. Rowe has attacked his second sentence on the grounds of former jeopardy and the involuntariness of his guilty plea. His petition was rejected by the Supreme Court of Appeals of Virginia without an opinion.

2. In 1964 Thacker was sentenced to the Virginia State Penitentiary to serve a sentence of over sixty years. Petitioner wants to attack three sentences which are scheduled to commence in 1994 and end in the year 2004. His date of eligibility for parole would not be advanced even if the three sentences were vacated. Thacker bases his petition on the grounds of inadequate representation by his counsel at the 1953 convictions.