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Constitutional Law - Right to Counsel - Gideon v. Wainright Made Retroactive. United States ex rel. Durocher v. LaVallee, 330 F.2d 303 (2d Cir. 1964)

Jeffery Graham

Constitutional Law—Right to Counsel—Gideon v. Wainwright Made Retroactive.—In *United States ex rel. Durocher v. La Vallee*[1] consolidated state prisoners' *habeas corpus* proceedings were appealed to the United States Court of Appeals for the Second Circuit upon the contention that prior out-of-state convictions which made petitioners multiple offenders were illegal because of lack of counsel. Appellants contend that they were unrepresented by counsel; were never given the opportunity to obtain counsel; were indigent at the time and did at no time expressly waive the right to counsel. All seek to invalidate these prior convictions by application of *Gideon v. Wainwright*.[2] In sum, the Court was faced with three issues which had to be resolved before it could apply the principles of *Gideon*. First, in *Gideon*, the plea was "not guilty" while in the instant case all pleaded guilty. Secondly, Mr. Gideon specifically requested the Court to furnish counsel; no such request was made in the case at hand. Third, the Supreme Court did not directly state that *Gideon v. Wainwright* was to be retrospective in nature and the convictions at hand all preceded the *Gideon* decision.

Justice Kaufman writing for the majority immediately dispatched the contention that a guilty plea removes a case from the hegimony of *Gideon v. Wainwright*, citing *Doughty v. Maxwell*,[3] as the controlling authority. The *Doughty* case involved an Ohio decision which refused to apply *Gideon v. Wainwright* to a situation in which the defendant pleaded guilty and failed to request counsel, on the grounds that the plea of guilty plus the failure to request counsel equalled a waiver of the right to counsel. The Supreme Court reversed this decision in a *per curiam* order on the basis of *Gideon v. Wainwright* and *Carnley v. Cochran*.[4] With this ruling the Supreme Court has for all intents and purposes imposed upon the states the federal rule in regard to right to counsel and its waiver.[5] Justice Kaufman makes the further point that a plea of guilty because it precludes a jury trial, would complicate the task of gauging lack of fairness in the absence of the detailed facts a trial generally brings forward. He states:

1. United States ex rel Durocher v. La Vallee, 330 F.2d 303 (2d Cir. 1964).

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

3. Doughty v. Maxwell, 376 U.S. 202 (1964).

4. Gideon & Carnley v. Cochran, 369 U.S. 506 (1962).

5. United States v. La Vallee, 306 F.2d 216 (2d Cir. 1962); United States v. Trilote, 297 F.2d 598 (2d Cir. 1961). Both illustrate the federal rule that waiver of counsel must be express and knowledgeable. In both these cases the federal courts refused to allow previous experience in state courts as a basis for the inference that the failure to request counsel was based upon a knowledgeable understanding of constitutional rights. See also, Rice v. Olsen, 342 U.S. 786 (1945).

> . . . that the precise degree of that disadvantage [lack of counsel] can never be satisfactorily measured by an-after-the fact search for prejudice.[6]

Thus in this section of its opinion, the Second Circuit is apparently satisfied that the burial of *Betts v. Brady* and its attendant doctrine of "fundamental fairness" [7] has been completed.

The second obstacle, that of the failure to request counsel, presents little or no problem to the court. It quotes Mr. Justice Brennan writing for the Supreme Court in *Carnley v. Cochran:*

> . . . it is settled that where the assistance of counsel is a constitutional requisite the right to be furnished counsel does not depend upon a request.[8]

It notes that the failure to request counsel in the Doughty case[9] presented no obstacle to the Supreme Court. Moreover, it is pointed out that under the law at the time of trial in *Betts v. Brady*[10] the requests would have been denied. Thus to require such results would, in the words of the court, "be requiring that defendants perform a meaningless ritual in order to preserve vitally important constitutional rights." [11]

The final issue to be dealt with, the retroactivity of *Gideon v. Wainwright,* brings the Court face to face with the ideal versus the real. It readily acknowledges that those benefitted will be far more serious offenders than those who have in the past benefitted from federal decisions which upset state convictions. It recognizes the difficulty of determining the events of prosecutions long past, whose records may well be lost or disorganized. Yet, says the Court, to deny the retroactivity of *Gideon v. Wainwright* would be to affix ". . . a lower constitutional status to pre-*Gideon* prisoners who were denied the right to counsel. . . ." [12] However, the Court feels that *stare decisis* governs the issue; that while the Supreme Court has not directly stated that *Gideon* is retroactive, its actions and the actions of other federal courts obviate for this Court the position that *Gideon* was only prospective

6. 330 F.2d 303, 308 (2d Cir. 1964).

7. Betts v. Brady, 316 U.S. 455 (1942), (law previous to Gideon v. Wainwright). An appeal based upon lack of counsel would not be sustained unless appellant could show that lack of counsel resulted in fundamental unfairness to him.

8. Carney v. Cochran, 369 U.S. 506, 513 (1962).

9. *Supra,* note 3.

10. *Supra,* note 7.

11. 330 U.S. 303, 309 (2d Cir. 1964).

12. *Id.* at 312.

in nature.[13] While such a decision is ideologically sound, to note its practical difficulties would seem equally sound; and if the Supreme Court takes the same position as to retroactivity in *Mallory v. Hogan*[14] the reaction from the various states will indeed make the welkin ring.

Jeffery Graham

Constitutional Law—PRIVILEGE FROM SELF-INCRIMINATION—APPLICATION IN STATE COURTS UNDER THE FOURTEENTH AMENDMENT.—The petitioner, ordered to testify before a referee appointed by the Superior Court of Hartford County, refused to answer questions concerning his earlier arrest and conviction for pool-selling on the grounds that his answers might tend to incriminate him. He was adjudged in contempt by the Superior Court and imprisoned until he was willing to answer the questions.

The Superior Court denied an application for a writ of habeas corpus; and that decision was upheld by the Connecticut Supreme Court of Errors, which ruled: (1) that the privilege against self-incrimination as stated in the Fifth Amendment is not available to a witness in a state proceeding; (2) that the Fourteenth Amendment did not extend the privilege to him; (3) that the privilege under the Connecticut Constitution had not been properly invoked.[1]

On appeal to the United States Supreme Court, it was held that the Fourteenth Amendment guaranteed the petitioner the privilege stated in the Fifth Amendment against self-incrimination and that the Connecticut Supreme Court of Errors incorrectly ruled that the privilege was not properly invoked.[2]

Justice Field's 1891 dissent in *O'Niel v. Vermont*[3] is the first indication by the Supreme Court that the Fourteenth Amendment might be considered to incorporate the Bill of Rights. In 1904 *Adams v.*

13. Per curiam opinions: 372 U.S. 766-770, 773-780 (1963). See also, U.S. ex rel Craig v. Meyers, 220 F. Supp. 762 (E.D. Pa. 1963), where state courts holding that Gideon was prospective is overruled.

14. Mallory v. Hogan, 64 S.Ct. 1489 (1964), Court brought the Fifth Amendment privilege against self-incrimination within the 14th Amendment's due process clause and thereby expressly overruled Twining v. New Jersey, 211 U.S. 78 (1908).

1. Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744 (1963).

2. Malloy v. Hogan, 84 S. Ct. 1489 (1964).

3. 144 U.S. at 363 (1891) "These rights, as those of citizens of the United States find their recognition and guaranty against Federal action in the Constitution of the United States and against State action in the Fourteenth Amendment." See also, Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?, The Judicial*