

January 1966

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Alan MacDonald and Gus James II, *Right to Counsel: A Perspective*, 7 Wm. & Mary L. Rev. 80 (1966), <https://scholarship.law.wm.edu/wmlr/vol7/iss1/5>

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COMMENTS

THE RIGHT TO COUNSEL: A PERSPECTIVE

INTRODUCTION

The right to be represented by counsel is one of the fundamental safeguards of liberty immune from federal abridgement by virtue of the Sixth Amendment of the United States Constitution. The right is equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. In the federal courts, the right to counsel rests on the specific language of the Sixth Amendment which states that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."¹

In 1932, the Supreme Court recognized that failure of a state court to appoint counsel to represent an indigent defendant, accused of a capital offense, was a deprivation of due process guaranteed by the Fourteenth Amendment.² Ten years later the Court refused to extend the rule to state non-capital offenses, unless the circumstances of the case were such that failure to appoint counsel would result in substantial unfairness to the defendant.³ In 1963, the Court reversed its ruling in *Betts v. Brady*, and held that refusal of a state court to provide counsel for an indigent accused of either a capital or non-capital offense was a violation of due process.⁴

The purpose of this note is to analyze two related questions left unanswered by the *Gideon* decision. The first considers the scope of the right to counsel as it relates to indigents accused of sub-felony offenses; while the second examines the correlative right of waiver as may be guaranteed in State prosecutions.

RIGHT TO COUNSEL IN SUB-FELONY OFFENSES

In *Gideon v. Wainwright*⁵ the Supreme Court ruled that the defendant, who was an indigent accused of a felony in a State Court, had a

1. U. S. CONST. AMEND. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. *Powell v. Alabama*, 28 U.S. 45 (1932).

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

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

5. *Ibid.*

right to be supplied with legal counsel. However, the question of whether an indigent, in similar circumstances, charged with a lesser offense is also entitled to be provided with legal representation remains unanswered. Despite the importance of this issue, the probability of the Supreme Court ever fully defining an indigent's right to counsel is remote. More than likely, one accused of a lesser offense, unable to post bond, would have served his sentence thereby causing this issue to become moot before the Supreme Court could ever hear and rule on it.

An accused's right to counsel in "all criminal prosecutions" is guaranteed by the Sixth Amendment of the Federal Constitution.⁶ The phrase, "all criminal prosecutions" is the only limitation imposed on the otherwise absolute right. Various state courts have defined a criminal prosecution as an action or proceeding instituted in a proper court on behalf of the public, for securing the conviction and punishment of one accused of a crime.⁷ If acceptable, this definition suggests that one accused of a crime has the right to be assisted by counsel and leaves unresolved only the question of determining the classes of unlawful acts within the term "crime". The United States Supreme Court has concluded that the word crime is synonymous with misdemeanor and includes every offense below felony which is punishable by indictment as an offense against the public.⁸ State courts have generally agreed that the term "crime" is not limited to felonies but that the latter classification merely indicates the character of the crime. Both state and federal courts agree that there is a class of public offenses not within the scope of "crime".⁹ These, they say, are less serious and are usually prosecuted summarily.¹⁰ Therefore, if the above definition of a criminal

6. U.S. CONST. AMEND. VI.

7. *Harger v. Thomas*, 44 Pa. 128, 84 Am. Dec. 422 (1862); *Ex parte Pepper*, 185 Ala. 284, 64 So. 112, 113 (1913); *State v. District Court of Fifth Judicial District*, 53 Mont. 350, 165 P. 294, 296 (1917); *McGoldrick v. Downs*, 184 Misc. 168, 53 N.Y.S.2d 333, 336 (1945).

8. *Kentucky v. Dennison*, 65 U.S. 66, 76 (1860).

9. *People v. Osslo*, 310 P.2d 1020, 1029 (Cal. 1957); *State v. Murdock*, 172 Ohio St. 221, 174 N.E.2d 543, 545 (1961); *Starks v. Turner*, 365 P.2d 564, 566 (Okla. Crim. 1961); *Barsky v. Board of Regents of the University of N. Y.*, 305 N.Y. 89, 111 N.E.2d 222, 225 (1953); *Gultling v. State*, 199 Ind. 630, 158 N.E. 593, 594 (1927); *Bostic v. U.S.*, 94 F.2d 636, 637 (D.C. Cir. 1931); *State v. District Ct. of First Judicial District, Lewis and Clark County*, 72 Mont. 374, 233 P. 957, 959 (1925); *In re Voorhees*, 32 N.J.L. (3 Vroom) 141, 147 (1867); *Stone v. City of Paducah*, 120 Ky. 322, 86 S.W. 531, 534 (1905); *State v. Bletz*, 171 Mo. 530, 71 S.W. 1027, 1030 (1903); *Lewis v. State*, 85 Miss. 35, 37 So. 497 (1904); *U.S. v. Flores-Rodriguez*, 237 F.2d 405, 407 (2d Cir. 1956).

10. Disorderly conduct is an example, see, *People ex rel. Cohen v. Collins*, 238 App.

prosecution is acceptable, the right to counsel should extend to indigents accused of all but the last mentioned offenses.

The above definition, however, incorrectly assumes that the phrases "criminal prosecution" and "prosecution for a crime" are synonymous. In *Schick v. U. S.*¹¹ the Supreme Court, construing the word "crimes" as it is used in Article III, Section 2 of the Federal Constitution, referred to 4 *Blackstone, Commentaries* 5 which reads:

the general definition comprehends both crimes and misdemeanors; which properly speaking are synonymous terms; though in common usage the word crime is made to denote such offenses as of a deeper more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of misdemeanor.

The Court then concluded that if the language of Article III, Section 2 had included the words "criminal offenses" rather than the word "crime" it might be made to apply to all offenses of a criminal nature, petty as well as serious. It is clear then that the reverse of this construction can be applied to define the words "criminal prosecutions" as they appear in the Sixth Amendment. If the words "In all prosecutions for crime" had been used in place of "In all criminal prosecutions" then the right to counsel guarantee would be limited to all prosecutions for a crime instead of allowing that right to extend to those accused of offenses of a criminal nature.

Implicit in the above argument is a distinction between two classes of offenses: those of a criminal nature and those not of a criminal nature. Offenses that are not within the technical classification of crime may nevertheless be classified as offenses of a criminal nature, thus broadening the scope of the right to counsel provision beyond that indicated by state court constructions of the words "criminal prosecutions".

The Supreme Court, while defining the right to a jury trial indicated that one accused of an offense that was a crime at common law, and *malum in se*, in nature could not be denied that right guaranteed by the Sixth Amendment.¹² Since all of the rights safeguarded by that Amend-

Div. 592, 265 N.Y. Supp. 475 (1933); *Zielinski v. Rasmussen*, 29 Misc. 2d 70, 217 N.Y.S.2d 834 (1961); *U.S. v. Au Young*, 142 F. Supp. 666, 667 (1956).

11. 195 U.S. 65, 69 (1904).

12. *Id.* at 67, the Court, classifying the quality of the offense of violating the Oleomargarine Act, said, "It is not one necessarily involving any moral delinquency." Also, see, *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930), where the Court formulated a test. It said: "Whether a given offense is to be classed as a crime, so as to require

ment share the "criminal prosecution" limitation, it follows then that the above criteria should also apply to the right to counsel provision. However, Congress ignored the above test by the passage of the Criminal Justice Act of 1964 which, in effect, denies an indigent accused of a petty offense his right to counsel.¹³ The Act adopted the existing statutory definition of a petty offense as "any misdemeanor the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500.00 or both."¹⁴

This arbitrary limitation of the right to counsel ignores the possibility that offenses within the petty offense category may include *mala in se* crimes. In Montana, for instance, petit larceny "is punishable by a fine not exceeding \$500 or by imprisonment in the county jail not exceeding six months or both."¹⁵ Thus if the Act applied to that State, an indigent so accused would not be within its right to counsel provision. Furthermore, although the Supreme Court has suggested that petty offenses are not criminal, it has never ruled that all minor offenses are petty, nor is such a conclusion correct, despite the implications of the aforementioned Criminal Justice Act. The offenses thus classified by the Court as petty, were all of a *mala prohibita* character and the laws violated were in the nature of municipal ordinances,¹⁶ because their function was to maintain the health, peace and tranquility of the community as opposed to enforcing the natural law.

Violations of municipal ordinances have been confined to the following:

breaches of by-laws and ordinances which in their nature are *mala prohibita*, and which by legislative sanction have been enacted by the municipality for its health, peace and tranquility, and in this state have

a jury trial, or as a petty offense triable without a jury, depends primarily upon the nature of the offense."

13. The Criminal Justice Act of 1964, 18 U.S.C. § 3006 A(b) (1964). "In every criminal case in which the defendant is charged with a felony or a misdemeanor other than a petty offense, and appears without counsel, the United States Commissioner or the Court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. . ."

14. 18 U.S.C. § 1(c) (1948).

15. MONT. REV. CODE, ch. 94, §§ 2704, 2705, 2707 (1947). Larceny of property valued at less than \$50 is petit.

16. District of Columbia v. Clawons, 300 U.S. 617 (1937), dealing in second-hand goods without a license; Schick v. U. S., *supra* note 11, violation of the Oleomargarine Act punishable by a \$50 fine; Natal v. Louisiana, 139 U.S. 621 (1891), violation of a city ordinance prohibiting private markets within six miles of public markets.

always been prosecuted without a jury. While it may be doubted that the Legislature may delegate to a municipality the right to declare certain acts offenses against the corporation and offenders thereof constitutionally subject to a criminal trial, it is very generally held that the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace and good order, and otherwise promoting the general welfare within cities and towns, may be prosecuted without a jury.¹⁷

Consistent with this view, the weight of authority among the states indicates that the violation of a municipal ordinance, enacted by a city under legislative authority, is not a crime.¹⁸ Furthermore, the prosecution of violations of such ordinances are not criminal, but have been called quasi-criminal insofar as they are subject to the rules of evidence.¹⁹

An indigent accused of a petty *malum prohibitum* offense is less likely to be characterized as morally corrupt if convicted than would one convicted of a *malum in se* offense entailing a similar punishment. It has been recently pointed out that because of

the increasing number of public employees in the large number of employment situations requiring fidelity bonds and other intensive scrutiny of personal background, the decision of whether the community is to provide legal services to the indigent should be based on the nature of the consequences of conviction rather than on the abstract legal classification within which the transgressive act happens to find itself.²⁰

It is the indigent, more than any other class of accused, who most needs employment and social acceptance, but at present it is he who is most

17. *Pearson v. Wimbish*, 129 Ga. 701, 52 S.E. 751, 753 (1906).

18. *Withers v. State*, 36 Ala. 252; *Williams v. City Council of Augusta*, 4 Ga. 509 (1848); *Wiggins v. City of Chicago*, 68 Ill. 372 (1873); *Levy v. State*, 6 Ind. 281 (1842); *State v. Boneil*, 42 La. Ann. 1110 (1890); *Cooper v. People*, 41 Mich. 403, 2 N.W. 51 (1879); *State v. Gustin*, 157 Mo. 108, 53 S.W. 421 (1899); *State v. Rouch*, 47 Ohio St. 478, 25 N.E. 59 (1890); *State v. Hamley*, 137 Wis. 458, 119 N.W. 114 (1909); Courts holding that the violation of such an ordinance is a crime: *Ex Parte Clark*, 24 Cal. App. 389, 141 P. 831 (1914); *State v. Vail*, 57 Iowa 103, 10 N.W. 297 (1881); *State v. West*, 42 Minn. 147, 43 N.W. 845 (1889); *Bautsch v. City of Galveston*, 27 Tex. App. 342, 11 S.W. 414 (1889).

19. *Barron v. City of Anniston*, 157 Ala. 399, 48 So. 58 (1908); *Wiggins v. City of Chicago*, 68 Ill. 372 (1873); *Town of Scranton v. Hansen*, 151 Iowa 221, 130 N.W. 1079 (1911); *State v. Hamley*, 137 Wis. 458, 119 N.W. 114 (1909).

20. *Burzon, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York*, 14 BUFFALO L. REV. 428, 453 (1965).

apt to be unjustly convicted of some minor *malum in se* crime, and thus suffer the corresponding social disabilities.

Some writers, ignoring the foregoing view, have suggested that the indigent's right to counsel be limited to those accused of crimes classified as felonies. However, if that opinion is to be followed the States will have to resolve some of the confusion existing among them by arriving at a common classification of felonies and misdemeanor. Most states agree that a crime punishable by death or imprisonment in a state penitentiary is a felony and that all other crimes are misdemeanors. However, a short investigation indicates that the above common standard should not be mistaken for uniformity. A few years ago, Massachusetts altered the conditions under which a sentence would be served in the state penitentiary for administrative reasons and by so doing converted some misdemeanors into felonies.²¹ In New Jersey most crimes are designated misdemeanors.²² Some states call reckless or negligent homicide by automobile a misdemeanor punishable by six months to one year imprisonment.²³ Other states call the same offense a misdemeanor, but attach a felony penalty of two years and/or \$2,000 fine.²⁴ This disunity among the states clearly demonstrates that a felony-misdemeanor dichotomy regarding an indigent's right to counsel would be unworkable without a federal standard defining each class, otherwise the states through their legislatures would retain control of this constitutional right. The present federal rule is that "any offense punishable by death or imprisonment for a term exceeding one year is a felony."²⁵

Another criterion was suggested by the Fourth Circuit in *Jones v. Cunningham*.²⁶ It stated:

Henceforth (post *Gideon*), state criminal courts, as in Federal District Courts, are under an absolute duty to supply indigent defendants faced with serious criminal charges, with legal assistance if the defendant desired it and cannot procure it for himself.

Adoption of this "serious" crime rule would necessitate case-by-case

21. Sutherland and Cressey, *Principles of Criminology*, 17 (6th ed. 1960).

22. N.J. REV. STAT. 2:14.1 (1937) kidnapping; N.J. REV. STAT. 2:163.1 (1937) forcible rape; N.J. REV. STAT. 2:166.1 (1937) robbery.

23. Moreland, *The Law of Homicide*, 246-252 (1952); Rosenfeld, *Negligent Homicide*, 25 CALIF. L. REV. 1 (1936); Robinson, *Manslaughter by Motorists*, 22 MINN. L. REV. 755 (1938).

24. MICH. COMP. LAWS § 750.324 (1948).

25. 18 U.S.C. § 1 (1948).

26. 319 F.2d 1 (4th Cir. 1963).

adjudication in order to define the term "serious crime". This would more than likely require the Supreme Court to review many State Court decisions and consequently do more harm to the ideal of federalism than would the imposition upon the States by the Federal Government of some pre-defined standards.

Presumptively, the indigent's right to be provided with the assistance of counsel exists in order to remove the inequities that might accrue to him because of his economic condition. According to Mr. Justice Douglas:

[T]he refusal to recognize the right of counsel in every criminal case has long seemed to me to be a denial of equal protection of the law . . . I know of no more invidious discrimination based on poverty.²⁷

The Supreme Court has held that discrimination based on wealth violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In *Griffin v. Illinois*²⁸ the State appellate procedure required the appellant to purchase a trial transcript in order to get a direct review of his case. There the Court reasoned that although the Federal Constitution does not require a state to provide appellate review, once a state does grant such review it cannot discriminate against some by refusing to allow them an opportunity to appeal solely because of their poverty. The Court stated: "There can be no equal justice when the kind of trial a man gets depends on the amount of money he has."²⁹ The Court applied similar reasoning in *Douglas v. California*.³⁰ There the procedure allowed the District Court of Appeals to deny indigent appellant's requests for the appointment of counsel if it believed that such appointments would not be of value to the Court or to the appellant. The Court stated:

where the merits of the one and only appeal an indigent has of right are decided without the benefit of counsel an unconstitutional line has been drawn between rich and poor . . .

There is lacking that equality demanded by the Fourteenth Amendment where the rich man who appeals as of right enjoyed the benefit of counsel's examination into the record, research of the law and marshalling of arguments in his behalf, while the indigent, already

27. *Right to Counsel Symposium*, 45 MINN. L. REV. 693 (1961).

28. 351 U.S. 12 (1956).

29. *Griffin v. Illinois*, *supra* note 28, at 19.

30. 372 U.S. 352 (1963).

burdened by a preliminary determination that his case is without merit, is forced to shift for himself.³¹

Both of these cases show little concern over the quality of the offense for which the poor man had been convicted, but rather center upon the injustice resulting because of his lack of funds. This reasoning can be applied to the analogous situation of the indigent at the trial level. Although a state may not be required to allow a man accused of a minor crime to retain counsel, once he is granted that right, it would be a denial of due process not to provide counsel for one similarly accused who is indigent. When the merits of an indigent's only trial are decided without the benefit of counsel, an unconstitutional line has been drawn between rich and poor. Therefore, since the rich man can retain counsel when accused of any offense then the indigent should be provided counsel when similarly charged. In *Evans v. Reves*³² the defendant, charged with refusing to support and maintain his minor child, was not informed of his right to counsel. The Court, reversing his conviction, stated . . . "so far as the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such a loss for a long one."³³

Thus far, *Harvey v. Mississippi*³⁴ is the only case that has applied the Gideon rule in a sub-felony crime situation. There an illiterate Negro, who had been active in civil rights movements, was arrested and charged with the illegal possession of liquor, a misdemeanor punishable by a fine of \$500.00 and/or ninety days in jail. The defendant was without counsel and pleaded guilty after being assured that he would only be fined. Instead he was sentenced to the maximum and the mittimus order was not issued until the forty day statutory period for appeal had passed. The Court of Appeals ruled that the indigent's guilty plea was invalid because he had not been given notice of his right to the assistance of counsel. It said:

While the rule as thus stated has never been expressly intended to mis-

31. *Douglas v. California*, *supra* note 30, at 357, 358.

32. 126 F.2d 633 (1942).

33. *Evans v. Reves*, *supra* note 32, at 638. This case has not been followed. In 1960, the District of Columbia created a system for the appointment of counsel in minor criminal cases, which unfortunately limited counsel to indigents accused of offenses punishable by imprisonment of a year or more. Cellar, *Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 MINN. L. REV. 697, 707 (1961).

34. 340 F.2d 263 (5th Cir. 1965).

demeanor charges in state tribunals, it has been argued that such a principle is implicit in the Supreme Court's decision in *Gideon v. Wainwright*. Be this as it may, the reasoning in *Evans v. Reves* along with other right to counsel decisions persuades us that we should apply that rule in the present case.³⁵

At present, those engaging in the right to counsel debate argue two irreconcilable points of view. One group contends that because the purpose of furnishing counsel to indigents is to reduce the discrepancy between the rich who can supply their own counsel and the poor who cannot, counsel should be made available to all indigents.³⁶ The other group simply states that "this new fetish for indigency piles an intolerable burden on the States' judicial machinery."³⁷ Here it is submitted that this debate be settled by allowing indigents their full rights under the Sixth Amendment, that is, extending their right to counsel to all criminal prosecutions. Thus, only in those instances where an indigent is accused of a petty *malum prohibitum* offense, one not of a criminal nature, should he be forced to defend himself without the aid of legal counsel.

THE CORRELATIVE RIGHT OF WAIVER AS MAY BE APPLIED IN STATE PROSECUTIONS

The recognition of the right to counsel as one of the fundamental rights of liberty guaranteed by the United States Constitution, has led federal courts to make every reasonable presumption against waiver.³⁸ In federal prosecutions an accused will not be deemed to have effectively waived his right to counsel unless the waiver was made voluntarily after a broad understanding of the whole record.³⁹ In *Von Moltke v. Gillies*,⁴⁰ the Supreme Court of the United States ruled that the federal standard requires that a waiver may not ordinarily be accepted until the court has determined that the accused understands the nature of the charge, the elements of the offense, the pleas and defenses available and the punishment that may be imposed.

While the federal standard clearly requires that the accused understand his peril before an effective waiver will be recognized, it fails to

35. *Harvey v. Mississippi*, *supra* note 34, at 271.

36. Judge Anderson, *Representation of Defendants*, 36 F.R.D. 136, 140 (1965).

37. *Douglas v. California*, *supra* note 31, at 359, dissenting opinion.

38. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Glasser v. United States*, 315 U.S. 60 (1942).

39. *Glasser v. United States*, *supra* note 38.

40. 332 U.S. 708 (1948).

establish a uniform definition of the understanding required.⁴¹ The Supreme Court recognizing that a workable criterion could not be promulgated which would apply to all situations, held that the question of effective waiver depends on the particular facts and circumstances of each case.⁴² Certain factors which have been held to bear upon the question are age, mental capacities, and background and experience of the accused.⁴³ For example, in *Glasser v. United States*,⁴⁴ the defendant was an attorney who was indicted for an alleged conspiracy to defraud the United States Government. The court held that being an attorney was immaterial to defendant's right to have counsel appointed, but considered his professional experience in determining whether he had effectively waived counsel.

In the federal courts the duty is imposed on the trial judge to protect the defendant's constitutional guarantee against any presumption of waiver.⁴⁵ Where the judge concludes that an effective waiver was made, his determination should appear upon the record.⁴⁶ The Supreme Court recognizing the necessity of this requirement stated that where the record fails to indicate that accused has intelligently and understandingly waived his right to counsel, his conviction should be reversed.⁴⁷

41. *U.S. v. Morgan*, 346 U.S. 502 (1954); *Carnley v. Cockran*, 369 U.S. 506 (1962). Record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer, and anything else is not a waiver of right to counsel.

42. *Johnson v. Zerbst*, *supra* note 38.

43. *Uveges v. Pennsylvania*, 335 U.S. 437 (1948). Accused who was young and inexperienced in the intricacies of criminal procedure should not have been permitted by state court to plead guilty to crimes of burglary which carry a maximum sentence of 80 years without an offer of the advice of counsel. And where accused was never advised of his right to counsel and no attempt was made by the court to make him understand the consequences of his pleas of guilty accused was not afforded a fair trial. *McNeal v. Culver*, 365 U.S. 109 (1961). 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 officers, and the complicated nature of the offense charged, and the possible defense render criminal proceedings without counsel so apt to result to injustice as to be fundamentally unfair, the Constitution requires that the accused must have legal assistance at his trial.

44. *Johnson v. Zerbst*, *supra* note 38.

45. *Johnson v. Zerbst*, *supra* note 38.

46. *Johnson v. Zerbst*, *supra* note 38. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive his right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for the determination to appear upon the record. *Carnley v. Cockran*, *supra* note 4.

47. *Carnley v. Cockran*, *supra* note 41.

The federal standard of protection as laid down by *Johnson v. Zerbst*⁴⁸ has been extended to protect a litigant who failed to request counsel.⁴⁹ The Supreme Court in applying the standard ruled that a waiver shall not be presumed from the mere failure to request counsel, for where assistance of counsel is a constitutional requisite it cannot be made to depend on request.⁵⁰

Prior to *Gideon v. Wainwright*,⁵¹ when the right to counsel was recognized in state prosecutions, the federal standard of waiver was held to be applicable.⁵² For example, in *Moore v. Michigan*,⁵³ the defendant was a Negro, 17 years of age, with a seventh grade education. He pleaded guilty to a charge of murder and was sentenced to life imprisonment. Before the guilty plea, the court advised the indigent of his right to counsel but he refused to accept. On appeal to the Supreme Court of the United States, the conviction was reversed. The Court ruled that when a person convicted in a state court has not intelligently and understandingly waived the benefit of counsel and where the circumstances show that his rights could not have been fairly protected without counsel, due process invalidates his conviction.

The *Gideon* decision, while extending the right to counsel to state prosecutions, left unanswered the question whether the federal standard of waiver will be applied in all state criminal prosecutions. The concurring opinion of Justice Harlan stated that his "understanding of the majority opinion does not embrace the concept that the Fourteenth Amendment incorporates the Sixth Amendment as such."⁵⁴ On the other hand, Justice Douglas in his concurring opinion stated that "rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guaranteed."⁵⁵

48. *Johnson v. Zerbst*, *supra* note 38.

49. *Johnson v. Zerbst*, *supra* note 38; *Carnley v. Cockran*, *supra* note 9; *McNeal v. Culver*, *supra* note 43. Accused's failure to request counsel does not constitute a waiver when accused does not know his right to counsel.

50. *Rice v. Olsen*, 324 U.S. 786 (1945). A defendant who pleads guilty is entitled to the benefit of counsel and a request for counsel is not necessary. It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel and that he does not intelligently and understandingly waive counsel.

51. *Gideon v. Wainwright*, *supra* note 4.

52. *Uveges v. Pennsylvania*, *supra* note 43; *Von Malke v. Gillies*, *supra* note 40; *Moore v. Michigan*, 355 U.S. 155 (1957).

53. 355 U.S. 155 (1957).

54. *Gideon v. Wainwright*, *supra* note 4, at 349.

55. *Gideon v. Wainwright*, *supra* note 4, at 345.

The nature of the right itself justifies the argument that in future cases the federal standard of waiver will be applied with equal force in state prosecutions. The right to counsel has been recognized as binding on the state court as a safeguard of liberty protected by the Due Process Clause of the Fourteenth Amendment.⁵⁶ Therefore, to allow a state court to presume waiver without imposing the federal duty to protect the right would be giving state courts the power to deny due process of law at the discretion of each judge. As Justice Douglas clearly implied, whenever a constitutional right is applicable to both a state and federal litigant, one is not to receive a lesser version of that right merely because his action lies in the state court.

The right of an accused to refuse the assistance of counsel and rely on his own skill was recognized in *Carter v. Illinois*.⁵⁷ The Supreme Court ruled that "neither the historic conception of due process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or confess guilt." Furthermore, in *Adams v. United States*,⁵⁸ the court recognized the right to dispense with counsel to be correlative of the right to the assistance of counsel. It follows then that if the right to waive counsel is to be recognized as a correlative of the right to have counsel, protection of the former is as essential to a fair trial as that of the latter.

This conclusion can be strengthened by looking at the historic trend of Supreme Court decisions which have applied the federal standard of waiver in state prosecutions. In cases prior to *Powell v. Alabama*,⁵⁹ the methods and practices by which state crimes were prosecuted were held to be a matter for the individual states, so long as they observed those ultimate dignities of man which the United States Constitution assured.⁶⁰ However, since the Sixth Amendment was not recognized as binding on the States during that period, the right to counsel and the standard for protecting the right were not included in the ultimate dignities of man assured by the United States Constitution. On the other hand, in cases after the *Powell* decision, where the right to counsel was recognized to be applicable in state capital prosecutions, the Supreme Court imposed the same duty of protecting the right on state courts that

56. *Carnley v. Cockran*, *supra* note 41.

57. 329 U.S. 173, 179 (1946).

58. 317 U.S. 269, 279 (1942). "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law."

59. 287 U.S. 45 (1932).

60. *Brown v. New Jersey*, 175 U.S. 172 (1899); *Missouri v. Lewis*, 101 U.S. 22 (1879).

had previously been imposed by the *Zerbst* decision on Federal Courts.⁶¹ Similarly, in cases after *Betts v. Brady*,⁶² where the right to counsel in state non-capital cases was determined to be applicable only under certain circumstances, the standard for protecting the right in these cases was clearly recognized by three Supreme Court decisions to be no less than that required in federal prosecutions.⁶³ Therefore, it appears that this historic pattern of case law which recognized waiver to be a correlative of the right to counsel should be followed in state criminal cases arising subsequent to *Gideon*.

The *Gideon* decision may be interpreted to extend the right to counsel to certain pre-trial stages of the proceeding or to all criminal prosecutions. However, regardless of how broadly the case is applied, it would appear that whenever the accused is guaranteed the right to counsel, his correlative right to waive must equally be guaranteed and protected.

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61. *Uveges v. Pennsylvania*, *supra* note 43; *Von Malke v. Gillies*, *supra* note 40; *Moore v. Michigan*, *supra* note 52.

62. *Supra* note 3.

63. *Carter v. Illinois*, *supra* note 22; *Bute v. Illinois*, 333 U.S. 640 (1948); *Rice v. Olsen*, *supra* note 50.