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White v. State of Maryland, 373 U.S. 59 (1963)

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Although juries are notably incapable triers of testamentary capacity and undue influence, the foregoing precautionary measures in the drafting and execution of the will provide a means by which to avoid a jury denial of a will in a contest proceeding. These precautions should discourage one from a contest against even an "unnatural" will and afford a much stronger case with which to convince the jury if there is a contest.

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PRELIMINARY HEARING IS A CRITICAL STAGE OF THE PROCEEDING AT WHICH THE INDIGENT DEFENDANT IS REQUIRED TO HAVE THE ASSISTANCE OF COUNSEL.—Defendant, Robert Galloway White, was arrested on May 27, 1960. He was charged with murder and both assault and robbery with a deadly weapon. The preliminary hearing was postponed and not held until August 9, 1960.[1] The defendant, who was not represented by counsel, entered a plea of guilty at the hearing. The defendant was called before the Criminal Court of Baltimore for arraignment on September 8, 1960, but because he was not represented by counsel at that time the arraignment was postponed. On the following day counsel was appointed to represent him. The arraignment was held on November 25, 1960 and the defendant entered pleas of "not guilty" and "not guilty by reason of insanity." At the trial the guilty plea which had been entered at the preliminary hearing was introduced into evidence without objection. The defendant was convicted and sentenced to death. On appeal to the Maryland Court of Appeals,[2] the defendant contended that the failure of the state to afford him appointed counsel at the preliminary hearing violated his constitutional rights to counsel. On certiorari to the Supreme Court of the United States, *held,* reversed. In a per curiam opinion the Court held the preliminary hearing to be a critical stage of the proceedings and stated that because the defendant had not been afforded counsel at this stage he was denied his constitutional right to counsel.[3] Setting aside any consideration of prejudice, the Justices agreed that the presence of counsel at the preliminary hearing was necessary to enable the accused to know how to plead intelligently. *White v. State of Maryland,* 373 U. S. 59 (1963).

The right of a defendant to representation by counsel of his own choosing has long been recognized and guaranteed in both state and fed-

[1]The August ninth hearing is not mentioned in the report of the appeal of the conviction to the Maryland Court of Appeals. White v. State of Md., 227 Md. 615, 177 A.2d 877 (1962). The record there indicates the defendant was charged before a magistrate on May 30, 1960. The reasons given for this four day delay were the continued investigation of a co-defendant's connection with the crime and a sharp curtailment of magistrates' sittings over the Memorial Day weekend. The United States Supreme Court report of the case mentions neither the May 30 hearing nor the reasons for the delay in having a preliminary hearing.

[2]White v. State of Md., 227 Md. 615, 177 A.2d 877 (1962).

[3]Upon return of the case to the Maryland Court of Appeals that court reversed the conviction in the Criminal Court of Baltimore and remanded the case for a new trial in accordance with the opinion of the United States Supreme Court. White v. State of Md., 231 Md. 533, 191 A.2d 237 (1963).

RECENT DECISIONS

eral prosecutions.[4] This right to secure counsel is so well established that no question can be raised as to its place in our system of criminal justice. However, the right of the *indigent* accused to have counsel appointed for him is not so well established. The instant case is a significant development in the law concerning the indigent defendant's right to counsel.

The development of the right to appointed counsel under the fourteenth amendment began with the case of *Powell v. Alabama*.[5] This case is generally considered the focal case because of the broad language used by the Court to describe the meaning of the constitutional right to counsel.[6] In the *Powell* decision the Court emphasized for the first time that a defendant has the right to counsel during the critical stages of the criminal proceedings against him.[7]

The scope of the broad rule set forth in the *Powell* decision was limited a few years later in *Betts v. Brady*.[8] In that case (non-capital), the *Powell* rule was confined to capital cases only. The Court held that in non-capital cases a rule of "fundamental fairness" was to be applied. By this test the defendant's right to appointed counsel was to be determined by whether the totality of the facts showed that the defendant had been afforded due process of law. Without ruling out the possibility that an absolute right to counsel might exist in capital cases, the *Betts* decision held that there was no such absolute right in non-capital cases.[9]

[4]U. S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The various state constitutional provisions affording the accused the right to counsel are similar to the federal provision. See MONT. CONST. art III, § 16. In Powell v. Ala., 287 U.S. 45, 69 (1932) the Court described the right to counsel of a defendant's own choosing as follows: "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such refusal would be a denial . . . of due process in the constitutional sense."

[5]287 U.S. 45 (1932); For a discussion of the history and development of the law of right to counsel, see Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right"*, 30 U. CHI. L. REV. 1 (1962); *The Right to Counsel: A Symposium*, 45 MINN. L. REV. 693 (1961).

[6]After noting that due process of law requires notice and a hearing as necessary preliminaries to any enforceable judgment, the Court stated:

> What, then, does a hearing include? Historically and in practice, in this country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. 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 evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence or evidence irrevelent to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he knows not how to establish his innocence. (287 U.S. at 68-69.)

[7]"[T]he circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against the defendants . . . [they] did not have the aid of counsel in any real sense." (287 U.S. at 57.)

[8]316 U.S. 455 (1942).

[9]Language in decisions which followed *Betts* continued to indicate that there was an absolute right to counsel in the capital cases. See, *e.g.*, Bute v. Ill., 333 U.S. 640, 674 (1948); Uveges v. Penn., 335 U.S. 437, 441 (1948).

The issue of the absolute right to counsel in capital cases was presented in *Hamilton v. Alabama*.[10] In that case the conviction was reversed because the state court failed to appoint counsel at the arraignment. The accused's right to appointed counsel was premised on a determination that the arraignment[11] was a critical stage of the proceedings where "only the presence of counsel could have enabled [the] accused to know all the defenses available to him and to plead intelligently."[12] The decision was not based upon whether the accused was prejudiced by the lack of representation nor upon a consideration of the totality of the facts of the case. The defendant was held to be entitled to have counsel appointed at the arraignment regardless of whether prejudice was shown and rgardless of what the totality of the facts of the case may have indicated. The failure of the state court to appoint counsel at the arraignment was a denial of the defendant's constitutional right to counsel.

The "fundamental fairness" test of *Betts*, as the basis for determining the defendant's right to counsel in non-capital cases, was recently reconsidered by the Court in *Gideon v. Wainwright*.[13] This decision, which overrules *Betts*, relied heavily upon the broad language originally utilized by the Court in the *Powell* decision. The case may be considered to have eliminated any distinction between the right to counsel of a defendant in a capital case as opposed to a defendant in a non-capital case.[14] The Court in *Gideon* views the right to counsel to be of the same fundamental nature as are certain of the rights found within the first eight amendments which had previously been made obligatory upon the states through the fourteenth amendment.[15] However, the *Gideon* decision does not answer the question of *when* in the criminal proceedings a defendant ought to become entitled to appointment of counsel to insure protection of his constitutional rights.

In the instant case the Court supplies at least a partial solution. The case holds that the right to appointment of counsel must be satisfied prior to the open court stage of the proceedings. This holding is an extension of the rules of *Powell* and *Hamilton*. In *Powell* the right to

[10]368 U.S. 52 (1961).

[11]The nature of the *arraignment* varies somewhat from state to state, but here the term is given its usual meaning and is descriptive of the open court proceeding wherein the defendant is formally read the charge contained in the indictment or information and is asked to plead to the charge. This stage is to be distinguished from the *preliminary hearing*, which usually refers to a proceeding before the committing magistrate where it is determined whether there has been a violation of criminal law and whether there are reasonable grounds to believe the defendant to be guilty of the offense. Typical statutes dealing with these two proceedings are found in REVISED CODES OF MONTANA, 1947 §§ 94-6101 to 6114 (on nature of and procedure for the preliminary hearing) and § 94-6514 (on procedure for the arraignment). Hereinafter REVISED CODES OF MONTANA are cited as R.C.M.

[12]See note 10 *supra* at 55.

[13]372 U.S. 335 (1963).

[14]The *Gideon* decision quoted favorably from the now-famous language of the *Powell* decision. See note 6 *supra*. *Id.*, at 344.

[15]Those rights which have been held to be of such a fundamental nature that they are immune to invasion by the state are: the freedoms of the press, speech, religion, assembly and petition for the redress of grievances found in the first amendment; the command of the fifth amendment that private property shall not be taken for public use without just compensation; the prohibition of the fourth amendment against unreasonable searches and seizures; and the ban of the eighth amendment on cruel and unusual punishment. See note 13 *supra* at 341-342.

counsel was discussed as existing at or near the trial. In *Hamilton* the right was specifically held to arise at the time of arraignment. In the instant case the Court is of the opinion that the defendant is entitled to have counsel appointed at the preliminary hearing.[16]

By entitling an indigent defendant to have counsel appointed at the preliminary hearing, the Court apparently rejects any requirement that prejudice be shown before the accused is entitled to have counsel appointed. This indicates that the Court is taking a broad view of the *Hamilton* rule, and serves as notice that the instant case is not to be narrowly limited to its facts. The defendant in the *Hamilton* case was required by the Alabama procedure to enter certain pleas and defenses at the arraignment or lose the right to plead them. The Court, in holding the defendant to be entitled to appointed counsel at the arraignment, stated that it was not concerned with whether prejudice in fact resulted due to the absence of counsel. It appeared to have been more concerned with the mere possibility that prejudice might result from the lack of counsel. The possibility of prejudice at the arraignment was considered to be a sufficient basis for holding that the arraignment was a critical stage of the proceedings. Had the Court intended the instant case to limit the *Hamilton* rule to those instances in which there was an actual possibility of prejudice, then the preliminary hearing would be a critical stage of the proceedings only because of the possibility of prejudice by the entry of the guilty plea at that time.

However, the implication that a broad view is to be taken of the holding of the instant case can be found in a comparison of the position occupied by the defendant in the instant case with that of the defendant in *Hamilton*. Under Maryland law the defendant was not to be formally charged with a crime at the preliminary hearing, was under no obligation to enter a plea, and could lose no defenses at that time.[17] It can readily be seen that the circumstances confronting the defendant in the instant case, in which he was required to take no affirmative action to protect his rights, did not afford the opportunity for prejudice to arise as did the arraignment in *Hamilton*. Nevertheless, the Court considered the preliminary hearing as *critical* as the arraignment under Alabama law. This would tend to minimize both the fact that the defendant entered a plea at the preliminary hearing and any requirement of prejudice. Thus, it is submitted that the Court is holding that an *absolute* right to counsel exists at the preliminary hearing.

[16]Although the Court took notice of the lack of any requirement under Maryland procedure to appoint counsel at the preliminary hearing the Justices felt that the rule of *Hamilton* must apply. Applying the rule to the instant case, the Court stated: "Whatever may be the normal function of the "preliminary hearing" under Maryland law, it was in this case as "critical" a stage as arraignment under Alabama law." Instant case at 59. Under the Maryland procedure applicable at the time of the trial in the *White* case, provision was made for appointment of counsel when a defendant was arraigned in open court in all capital or other serious cases. MD. ANN. CODE rule 723(b). It should be noted that as of August 10, 1963, a new revision effecting the arraignment procedure was adopted by the Maryland Court of Appeals. This new procedure provides for advising a defendant appearing in court at any stage of the proceedings that he has the right to counsel. The new rule also provides for appointment of counsel if the offense is punishable by death or by imprisonment for six months or more. MD. ANN. CODE rule 719(b)(1) & (2).

[17]See note 2 *supra*.

The developments found in other recent decisions in the field of right to counsel indicate the *critical stage of the proceedings doctrine* to be the test of when the right to counsel arises. The current scope of this doctrine is defined by the *Hamilton* and *White* decisions. In addition, the *Gideon* decision suggests which criminal prosecutions will ultimately be within the scope of the doctrine. The *Gideon* decision indicates that an absolute right to counsel exists in all criminal prosecutions, but the scope of "all criminal prosecutions" is still an open question.[18] Although the full effect of these decisions has not yet been determined, the opinions do set forth guidelines which indicate the course the Court may be expected to take in the future.

Under the *critical stage of the proceedings doctrine* the right to counsel is not to be limited to representation at the trial or even to representation at the arraignment. The *critical stage*, so far as the rights of the defendant are concerned, is apparently present very early in the proceedings and long before arraignment in open court. Since the right to counsel is not dependent upon any showing of prejudice, it could well be said to arise even before the accused is brought before the committing magistrate.[19] It is submitted that it is not necessary to show prejudice because the fundamental nature of the right to counsel absolutely entitled the accused to representation, not only for the protection which the presence of counsel may secure, but also to provide the defendant with all the benefits which trained counsel may supply. It seems the right to counsel is viewed as a right basic to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[20] Further, this right cannot be denied at any stage of the proceedings in any capital or non-capital case without such denial resulting in a denial of due process under the fourteenth amendment.[21] In

[18]Johnson v. Zerbst, 304 U.S. 458 (1938), which established the absolute right to counsel rule in federal criminal proceedings, did not decide the issue for federal prosecutions, and no subsequent federal case has squarely presented the issue to the Court. Mr. Justice Harlan's concurring opinion in *Gideon* indicates that he believes "all criminal prosecutions" to mean only those offenses which "carry the possibility of a substantial prison sentence." See note 13 *supra* at 351. However, the majority opinion of Mr. Justice Black and the concurring opinions of Mr. Justice Clark and Mr. Justice Douglas do not indicate that any distinction exists between those offenses involving a substantial prison sentence and those involving punishment of a lesser degree.

[19]The Court has recently considered the defendant's right to counsel during the period immediately following arrest in Crooker v. Cal., 357 U.S. 433 (1958), and in Cicenia v. LaGray, 357 U.S. 504 (1958). In both instances it was held that no absolute right to counsel existed during the period of police interrogation. However, both of these decisions were handed down under the authority of *Betts v. Brady* and the fundamental fairness test. With the overruling of *Betts* and the abolition of any requirement that the right to counsel be founded on a showing of prejudice, these cases would appear to no longer control the determination of whether the accused has a right to counsel at the early stages of the proceedings. Mr. Justice Douglas, joined by the Chief Justice and Justices Black and Brennan, dissented in *Crooker*. In this dissent the specific services which an attorney could perform during the period immediately following arrest were noted. Without the benefit of these services the accused was not considered to be assured of due process. These Justices, even before the *Gideon* decision, would have recognized an absolute right of the defendant to counsel at the time of arrest.

[20]Powell v. Ala., 287 U.S. 45, 67 (1932); quoted favorably in Gideon v. Wainwright, 372 U.S. 335 (1963).

[21]A requirement that the states furnish counsel before arraignment would provide a defendant in state court with a right to counsel prior to the time the right would arise in federal court under the present federal criminal practice. FED. R. CRIM. P. 44

some future decision the Court may be expected to hold that an indigent defendant is entitled to have the assistance of appointed counsel in all criminal prosecutions from a point shortly after the moment of arrest.

Effect of the White Decision in Montana

The *White* decision will have substantial effect on Montana criminal procedure. In Montana the accused has the right to appear and defend in person and by counsel in all criminal proceedings.[22] The statutes also provide for appointment of counsel for indigent defendants at the time of arraignment in district court.[23] However, there is no provision for appointment of counsel at the preliminary hearing or any other early stage.

An accused who is brought before a justice of the peace upon arrest must be advised of his rights to the aid of counsel at every stage of the proceedings.[24] He must be allowed a reasonable time to send for counsel and the examination must be postponed until counsel can be secured.[25] These statutes pertain only to the defendant's right to secure counsel and do not provide for appointment of counsel.

In the procedures governing the justice of the peace courts there are no provisions for appointment of counsel at any stage of the proceedings. Further, the Attorney General of Montana has ruled that the justice of the peace courts have no authority to appoint counsel at the preliminary hearing or at any other stage of the proceedings over which they have jurisdiction.[26] This ruling was based on a finding that the power to appoint counsel is purely statutory and under the current statutes such power is vested only in the Montana District Courts.

It is clear the present statutes do not satisfy the rules of either the *Gideon* or *White* decisions. Thus, action should be taken at the next legislature to consider the enactment of legislation which would insure compliance with the broad rule indicated by these cases. It is submitted that legislation should be considered which would contain provisions for the appointment of counsel for the indigent defendant at least at the preliminary hearing in all criminal prosecutions.[27]

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provides for appointment of counsel if the defendant appears *in court* without representation and is unable to afford his own counsel. FED. R. CRIM. P. 5(b) provides for advising the defendant at the preliminary hearing of his right to retain counsel. However, this rule has not been interpreted to give the accused the right to have counsel appointed at the preliminary hearing. Burall v. Johnston, 146 F.2d 230 (9th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945). An amendment has been proposed to the present rules governing procedure at the preliminary hearing in federal cases. This amendment would require the United States Commissioner to advise the accused of his right to counsel at the hearing. COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, U.S. JUDICIAL CONFERENCE, PRELIMINARY DRAFT OF PROPOSED AMMENDMENTS TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, Rule 5 (1962). Adoption of this amendment by the United States Supreme Court would clearly indicate that the Court believes the defendant has an absolute right to counsel at the preliminary hearing as a necessary element of due process.

[22]MONT. CONST. art. III, § 16; R.C.M. 1947, § 94-4806.

[23]R.C.M. 1947, § 94-6512.

[24]R.C.M. 1947, § 94-6101.

[25]R.C.M. 1947, § 94-6102.

[26]15 OPS. ATT'Y GEN. 157 (1933).

[27]As noted, the scope of "all criminal prosecutions" is not yet defined. However, providing for appointment of counsel in all proceedings in justice of the peace and police courts as well as in the district courts would insure maximum compliance with constitutional guarantees as defined by the Supreme Court of the United States.

Legislation was enacted at the 1963 Legislative Assembly which authorized the establishment of the current Criminal Law Commission.[28] This body, which is composed of judges from the Supreme Court of Montana and the district courts, practicing attorneys representing both prosecutors and defense counsel, and faculty members of the Montana State University Law School, is currently engaged in drafting revisions to Montana criminal law and procedure which will be proposed for enactment at the 1965 Legislative Assembly. The change in the current law suggested here is similar to at least one of the proposals currently being considered by the commission.[29]

This new legislation would be no great departure from principles and procedures which have long been recognized and made available in Montana. As noted, the present statutes allow the defendant to secure counsel at the preliminary hearing.[30] Additionally, a Montana statute affords to any person who is restrained of his liberty for any cause the right to see and consult with counsel in private if he desires to do so.[31] The proposed changes would do no more than eliminate the distinction between the rights of a defendant who is able to secure counsel of his own and the rights of one who is not able to do so.

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[28]Laws of Montana 1963, ch. 103, at 202.

[29]The Committee proposal recommends repeal of R.C.M. 1947 § 94-6512 and enactment of: When the defendant appears for arraignment or preliminary proceedings, he must be informed by the court that it is his right to have counsel before proceeding and must be asked if he desires the aid of counsel. If he desires counsel, a court of record must assign counsel to defend him if he is unable to employ counsel. The defendant may waive his right to counsel except that in all felony cases where the defendant is under twenty-one (21) years of age, the defendant shall be represented by counsel at every stage of the proceedings, including arraignment, preliminary hearing, and trial.

[30]R.C.M. 1947, § 94-6101.

[31]R.C.M. 1947, § 93-2117.