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Ralph E. Thomas

UNITED STATES SUPREME COURT — PUBLIC DEFENDER BY JUDICIAL FIAT?

By Ralph E. Thomas

It is a fundamental truism of constitutional law that the specific guarantees contained in the Bill of Rights to protect the people from invasion of their rights by the federal government are not all included in the due process clause of the Fourteenth Amendment to protect these same rights from invasion by the states.[1] Until recently, the guarantee of assistance of counsel contained in the Sixth Amendment[2] had been held not to be included, *per se*, in the Fourteenth Amendment,[3] and thus was not binding upon the States in all criminal cases. In a criminal action brought in a state court, whether the "right" to assistance of counsel existed was made to depend upon the circumstances of each case, and what was protected as a constitutional "right" in one case was deemed not to be so essential to a fair trial as to be considered a "right" in another case.

The Court has progressively enlarged the scope of the assistance of counsel protection during the past 33 years. Beginning with the case of *Powell v. Alabama*[4], it was established that this specific guarantee contained in the Sixth Amendment did constitute an essential and fundamental element of due process of law under certain circumstances. That case involved poorly educated Negro youths being tried for the crime of rape in a southern state, amid great feeling of hostility. Under the state law of Alabama, the crime of rape carried a maximum penalty of death. No effective assistance of counsel was provided for the defendants in the trial court. Within this setting, the Court stated:

> We are of the opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not now determine. All that it is necessary now to decide, as we do decide, is that in a *capital* case, where the defendant is unable to employ 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; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of *effective* aid in the preparation and trial of the case. (Emphasis added)[5]

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1. Palko v. Connecticut 302 U.S. 319 (1937)
2. In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. U. S. CONST. amend. VI.
3. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . U.S. CONST. amend. XIV.
4. Powell v. Alabama, 287 U. S. 45 (1932).
5. *Id.* at 71.

From this holding evolved what shall be referred to as the "capital offense" rule, that assistance of counsel in *capital* cases is an essential element of due process as embodied in the Fourteenth Amendment, and when circumstances demand, it is the duty of state courts to appoint counsel to assist the accused whether such assistance is requested or not.

The case of *Betts v. Brady*[6] established the "special circumstances" rule, foreshadowed by *Powell,* as the criterion for determining due process in non-capital felonies being tried in state courts. The court there conceded that former opinions "lent color" to the argument that one charged with a crime who is unable to obtain counsel must have counsel furnished by the state, regardless of the circumstances. But the Court refused to adopt this argument and adhered to the "special circumstances" rule for *non-capital* cases by saying:

> To deduce from the due process clause a rule binding upon the State in this matter would be to impose upon them . . . a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction . . . . (W)e cannot say that the (Fourteenth) Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.[7]

Thus, the "right" to assistance of counsel depended upon the type and seriousness of the crime with which the accused was charged. As to all crimes within the jurisdiction of the federal courts, the Sixth Amendment guarantee of assistance of counsel was applicable, irrespective of whether the crime was a capital or non-capital offense. But as to crimes within the jurisdiction of the state courts, the accused's "right" depended upon whether assistance of counsel was essential to due process so as to be included within the Fourteenth Amendment guarantee. By virtue of the *Powell* decision, if the accused was charged with having committed a capital offense, assistance of counsel was deemed to be essential to due process and thus guaranteed. But if the accused was charged with a non-capital offense, assistance of counsel was not guaranteed, and was made to depend upon the special circumstances of each case.

On March 18, 1963, Clarence Earl Gideon accomplished what had been previously attempted but never successfully. On a write of certiorari, in the case of *Gideon v. Wainwright*[8] the Supreme Court overruled *Betts v. Brady* and held that the right to assistance of counsel was a fundamental and essential element of due process in all non-capital cases, irrespective of special circumstances. The Court, in a unanimous opinion, stated:

> We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, how-

6. Betts v. Brady, 316 U.S. 455 (1942).
7. *Id.* at 473.
8. Gideon v. Wainwright, 372 U.S. 335 (1963).

ever, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.[9]

One bothersome feature of the Gideon decision is that the Court placed no express limitation upon the application of the rule established by their holding. The question which immediately suggests itself is whether the Court meant to include misdemeanors as well as felonies within the *Gideon* rule. The Court entirely disregarded the fears expressed in the *Betts* case that

> To deduce from the due process clause a rule binding upon the States . . . would be to impose upon them . . . a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As (the lower court judge) says: 'Charges of small crimes tried before justices of the peace and capital charges tried before the higher courts would equally require the appointment of counsel . . . .' And, indeed, . . . as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner, *logic would require the furnishing of counsel in civil cases involving property.* (Emphasis added.[10])

The right to assistance of counsel of a man charged with a misdemeanor in federal court was upheld in *Evans v. Rives*,[11] and the case of *Harvey v. Mississippi*[12] held that a Negro farmer charged with "possession of whiskey," a misdemeanor, was entitled to assistance of counsel in a state court. The Criminal Justice Act of 1964, enacted to provide for the representation of indigent defendants in federal courts, provides for the appointment of counsel "In every criminal case in which the defendant is charged with a felony or a misdemeanor, *other than a petty offense* . . . ."[13] A petty offense is defined 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, or both.[14]

Without doubt, misdemeanors are crimes, and a prosecution for a misdemeanor is a criminal prosecution.[15] In Wyoming, Justices of the Peace have such jurisdiction to hear and determine cases of misdemeanor as may be provided by law,[16] and may impose jail sentences up to six months in duration.[17] Keeping in mind the above provisions of the law, consider the language employed by the Court in the *Evans* case wherein they disposed of the argument that the right to assistance of counsel applied only to "serious offenses" by stating:

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9. *Id.* at 342.
10. *Supra* note 6 at 473.
11. Evans v. Rives, 126 F. 2d 633 (D.C. Cir. 1942).
12. Harvey v. Mississippi, 340 F. 2d 263 (5th Cir. 1965).
13. 18 U.S.C. § 3006 A (b).
14. 18 U.S.C. § 1
15. BLACK, LAW DICTIONARY p. 445 (4th ed. 1951)
" . . . the better use appears to be to make *crime* a term of broad and general import, including both felonies and misdemeanors, and hence covering all infractions of the criminal law."
16. WYO. CONST. Art. 5 § 22
17. Wyo. Stat. § 7-409 (1957)

> No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction . . . . And so far as the right to assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.[18]

In view of the above language, and in view of the *Harvey* case which extended the right to assistance of counsel in a state case to what would be described as a petty offense,[19] *quaere* whether the admonitions of the Court in the *Betts* decision are not proving to be an extremely accurate prophesy of the future. Since due process applies to the deprivation of property as much as to the deprivation of life or liberty, and since assistance of counsel has been declared to be a fundamental and essential element of due process, it would seem that the final step in the *Betts* prophecy, the furnishing of counsel in civil cases involving property, needs only time to bring about its fruition.

The assistance of counsel protection is necessarily related intimately with the protection against self incrimination. In order to fully appreciate and understand the impact of recent Supreme Court decisions regarding these two protections, it is essential to have a basic understanding of the former applications of the protection against self incrimination.

Prior to 1954, the protection against self incrimination wore two hats. One form of this protection was derived from the Fifth Amendment[20] and was binding upon the federal courts only. The Fifth Amendment protection prohibited the use of "the processes of justice by which the accused may be called as a witness and required to testify" against himself.[21] This meant that the accused could not be punished by contempt proceedings for refusing to answer questions which would incriminate him, nor could he be compelled by subpoena to produce incriminating records. The Fifth Amendment protection was against the use of *judicial* or *legal processes*, the procedural methods available to the courts, to *compel* a person to be a witness against himself.

The second form or source of the protection against self incrimination was derived from our Anglo-American system of jurisprudence, having as its foundation the basic philosophy that our modern society will not condone the use of force, extortion, fear or improper inducement to overpower the free will of the accused and to produce statements from him which are later offered in evidence against him at his trial on a criminal charge. The use of such a coercive influence upon the accused debased that fundamental due process of

18. *Supra* note 11 at 638
19. The maximum penalty provided for the misdemeanor with which Harvey was charged was 90 days in jail and $500 fine. This would be classified as a "petty offense" within the provisions of the federal legislation, *supra* note 14.
20. No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ., U. S. CONST. amend. V
21. Brown v. Mississippi, 297 U.S. 278, 285 (1936)

law essential to our system of justice. Because the use of coercion to overcome the free will of the accused was violative of due process, protection against self incrimination by the use of coerced confessions was binding against the states through the Fourteenth Amendment.

A long line of decisions, commencing with *Twining v. New Jersey*[22] in 1908 and most recently reaffirmed in *Cohen v. Hurley*[23] in 1961 established as settled law that the Fifth Amendment privilege against self incrimination was not "a fundamental right" and therefore was not binding upon the states as a part of due process. This meant that the accused was not protected in a state court from being compelled to testify against himself, under threat of contempt proceedings if he refused. Nor was the accused, in a state court, excused from the demands of a subpoena requiring him to produce incriminating records. Thus the anomalous situation existed in state courts, wherein the accused was not protected from being compelled to testify during the trial, and was subject to contempt proceedings if he refused, while at the same time the due process clause of the Fourteenth Amendment protected him from coercion or undue influence used to extort incriminating statements from him *prior* to the trial.

This anomaly was corrected by the Supreme Court in 1964 with the decision rendered in *Malloy v. Hogan*[24], wherein the court stated:

> We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States.[25]

The Court held that the distinction between compulsion by judicial process during a trial and "compulsion by torture to extort a confession" prior to trial, laid down in *Brown v. Mississippi*[26], had been abandoned, and

> (T)oday the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568, the Court held that "(i)n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself'."[27]

Thus the Fifth Amendment privilege against self incrimination was made binding upon the states, and the privilege protects against both compulsion by judicial process and compulsion by coercion, force or undue influence.

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22. Twining v. New Jersey, 211 U.S. 78 (1908)
23. Cohen v. Hurley, 366 U.S. 117 (1961)
24. Malloy v. Hogan, 378 U.S. 1 (1964)
25. *Id.* at 6
26. *Supra* note 21
27. *Supra* note 24 at 7

Most informed people herald as a major step forward these recent decisions of the Supreme Court holding that the Sixth Amendment right to assistance of counsel and the Fifth Amendment privilege against self incrimination are embodied within the due process of law protection guaranteed by the Fourteenth Amendment. These decisions are laudable, both from the standpoint of protecting individual liberties and as a final definitive expression of the law. But the Supreme Court has gone beyond providing these constitutional protections to individuals accused in state courts. By combining the rights to assistance of counsel with the privilege against self incrimination, the Court has created a new rule governing the admissibility of evidence, never before recognized in either state or federal courts, even in capital crime cases.

The Court had previously held that the absence of counsel when a confession was made, standing alone, was insufficient to make the confession inadmissible, but was merely one factor to be considered in determining whether the confession was voluntary or involuntary.[28] In the *Malloy* case, the Court said that wherever a question arises as to whether a confession is incompetent because not voluntary, the test

> is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary; that is, (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' (Citation omitted) . . . In other words the person must not have been compelled to incriminate himself.[29]

However, in the recent decision of *Massiah v. United States*[30] the voluntary or involuntary rule was ignored, and the decision was based solely upon the absence of counsel when the incriminating statements were made. The case involved two co-defendants, Colson and Massiah, who had been indicted on a charge of conspiring to possess, import and facilitate the sale of narcotics. The defendants retained counsel, entered a plea of not guilty and were released on bond. Colson, having agreed to cooperate with the government agents in their continuing investigation, allowed a radio transmitter to be concealed in his automobile and monitored by government agents. Subsequently, during the course of a conversation between the two co-defendants while seated in the automobile, Massiah made incriminating statements to Colson and these were overheard by the agents. On the basis of these incriminating statements offered in evidence at the trial, Massiah was convicted of several related narcotics offenses. The convictions were affirmed by the Court of Appeals and the Supreme Court reversed on certiorari. The Supreme Court said

> We hold that the petitioner was denied the basic protections of that (Sixth Amendment) guarantee when there was used against him at his

28. Spano v. New York, 360 U.S. 315 (1959)
29. *Supra* note 24 at 7
30. Massiah v. United States, 377 U.S. 201 (1964)

> trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. . . . All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial. (Emphasis in the opinion).[31]

Inasmuch as the defendant had retained counsel, had been represented by counsel at all prior proceedings, and was in no way denied the right or restrained from conferring with counsel in the preparation of his defense on as many occasions as he should choose, logic compels the conclusion that the constitutional right to assistance of counsel, as recognized by prior decisions, was not violated. The language of the Court refers to "incriminating words" and "incriminating statements," indicating that the Court, although grounding its decision upon the absence of counsel at the time the incriminating statements were made, was in fact affording to the defendant the privilege against self incrimination. But the constitutional privilege against self incrimination, as formerly recognized, affords protection only against *compulsion*, either by judicial process or by the use of force or undue influence. Massiah was free on bail and free from any coercive influences. He was in no way compelled to make the incriminating statements.

We are left with the apparent conclusion that not only is the assistance of counsel a constitutional right, but the *absence of counsel* has replaced the voluntary or involuntary rule as a rule of evidence to determine the admissibility of confessions. Thus, the assistance of counsel protection now encompasses not only direct interrogation of a person in custody, where the *possibility* of coercion is present, but also conversations of the accused while free from custody and free from any coercive influences.

Once having decided that the assistance of counsel is a constitutional right applicable to all criminal actions in state courts[32], and having decided that statements are inadmissible as evidence at the trial of the accused when made in the absence of counsel after the right to assistance of counsel has become consummate[33], the only remaining inquiry is the determination of when the right to assistance of counsel accrues. Since the Fifth Amendment requirement of an indictment by a grand jury[34] is not binding upon the states[35], the procedural methods for bringing an accused criminal to trial varies among the several states. The premise that "effective" assistance of counsel requires that the right extend to pre-trial proceedings has been universally accepted since *Powell v. Alabama*.[36] This has variously been held to mean after indictment[37]

31. *Id.* at 206, 207
32. *Supra* note 8
33. *Supra* note 30
34. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . U.S. CONST. amend. V
35. Hurtado v. California, 110 U.S. 516 (1884)
36. *Supra* note 4
37. *Supra* note 24

at the preliminary hearing[38], or at the arraignment.[39] But despite this disparity, the time at which the right came into existence had always been subsequent to the institution of formal legal or judicial proceedings against the accused in one form or another. But the Supreme Court departed again from past precedents in deciding the case of *Escobedo v. Illinois*[40] with the bland assertion, "that fact should make no difference".[41]

This case involved a twenty-two year old man of Mexican extraction accused by a man in police custody of having murdered his brother-in-law. Escobedo, the accused, was taken into police custody for interrogation. He requested, but was denied, the opportunity to confer with a previously retained lawyer. Ultimately he implicated himself in the murder plot by declaring his accuser to be the one who fired the fatal shot. Further interrogation produced additional incriminating statements which were introduced in evidence at the trial and resulted in the conviction of Escobedo for murder. The Supreme Court reversed the conviction with the statement:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' (citation omitted) and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[42]

At first blush, the decision appears to be restricted by several limitations, but the Court later goes on to say:

> We hold only that when the (investigation) process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.[43]

It would appear that the Supreme Court could have reversed the Escobedo conviction, thus reaching the result they chose, without having combined the right to assistance of counsel with the privilege against self incrimination to create a new constitutional "right". Escobedo had retained counsel prior to the time of his interrogation. He repeatedly requested permission to confer with his counsel, and his counsel repeatedly requested permission to confer

38. White v. Maryland, 373 U.S. 59 (1963)
39. Hamilton v. Alabama, 368 U.S. 52 (1961)
40. Escobedo v. Illinois, 378 U.S. 478 (1964)
41. *Id.* at 485
42. *Id.* at 490, 491
43. *Id.* at 492

with his client. These requests were denied. Under these circumstances, there was an *actual* denial of the assistance of counsel upon which the Supreme Court could have grounded their decision. But from the tenor of the Court's decision, it was obviously their intent to provide the defendant with protection against self incrimination. Even this could have been accomplished, under the circumstances, without tying it in with assistance of counsel. Since Escobedo was held in custody under abusive circumstances for an extended period of time without being formally charged with any crime, and since he was interrogated without being advised of the right to remain silent, the incriminating statements were obviously induced by the exertion of undue influence such as to make them involuntary and hence inadmissible. Less abusive circumstances have resulted in a confession being declared involuntary.[44]

The *Massiah and Escobedo* decisions have created a hiatus in the state courts, as to the proper interpretations to be applied. The California[45] and Rhode Island[46] courts have accepted them as having established the rule that incriminating statements obtained in the absence of counsel after the investigation has focused upon a particular suspect, are inadmissible as evidence because violative of the assistance of counsel guarantee, regardless of whether the accused did or did not have a lawyer before the interrogation began. If this is the rule intended by the Supreme Court then it is submitted that a new constitutional "right" has indeed been created by judicial fiat, in utter disregard of the intent and purpose of the specific guarantees of assistance of counsel and the privilege against self incrimination. This "right" goes far beyond protecting the accused from the perplexities of legal technicalities at the trial, or protecting him from compulsion or coercion.

But certain facts point to the conclusion that these decisions were not intended to create a new constitutional "right", and that the California and Rhode Island courts have given them a more liberal construction than the Supreme Court intended. Both Massiah and Escobedo were represented by counsel when their incriminating statements were obtained. In both cases the Court referred repeatedly to the particular circumstances of the case, and nothing in the language of the court indicated their intent to establish a rule applicable outside the particular circumstances being considered. In the case of *Malloy v. Hogan*[47], decided two months after *Massiah* and one week before *Escobedo,* the Court reaffirmed that the test of admissibility of a confession was whether it was voluntary or involuntary, thereby indicating that presence or absence of counsel was not to be the general test. And several states having occasion to interpret the Massiah and Escobedo decisions have refused to give

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44. Haynes v. Washington, 373 U.S. 503 (1963)
45. People v. Dorado, 394 P.2d 952 (Calif. 1964)
46. State v. Dufour, 206 A.2d 82 (R.I. 1965)
47. *Supra* note 24

them the liberal construction suggested by California and Rhode Island,[48] and have also refused to apply them retroactively, thus indicating that the rights announced therein do not attain constitutional status as did the right announced in *Gideon v. Wainwright.*

Ultimate solution of the problem must await further clarification by the Supreme Court. But if the Supreme Court has in fact created a new constitutional "right" to assistance of counsel from the moment an investigation becomes focused on a particular suspect, and if this "right" applies to all crimes, misdemeanors and felonies alike, and if all incriminating statements made in the absence of counsel are inadmissible as evidence even though voluntarily made, then it would seem that the court has placed an unbearable burden upon those charged with the duty of enforcing the law. To afford technical assistance to cope with procedure and to protect against coercion is just. But to prohibit the most conclusive type of evidence, the confession or incriminating statement, on the false assumption that it must be tainted if made in the absence of counsel, is to do an inexcusable injustice to those responsible for law enforcement. The protection of the innocent has a correlative obligation, which is the conviction of those who commit crimes against society. Who is more "innocent"—a person who has been accused of a crime, or society? When the rights of society and those of an individual conflict, the rights of the individual must give way. If society is made to suffer from an already nearly uncontrollable criminal malignancy, then the pendulum has swung too far.

48. See Browne v. State, 131 N.W. 2d 169 (Wis. 1964); Commonwealth v. Patrick, 206 A.2d 295 (Pa. 1965); State v. McLeod, 1 Ohio St. 2d 60, 203 N.E. 2d 349 (1964); Pece v. Cox, 396 P.2d 422 (N.Mex. 1964); Bean v. State, 33 U.S.L. Week 2390 (Jan. 22, 1965); Anderson v. State, 205 A.2d 281 (Md. 1964); People v. Hartgraves, 202 N.E. 2d 22 (Ill. 1964)