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Douglas L. C. Jones

THE RESPONSIBILITY OF THE BENCH IN REGARD TO INDIGENT DEFENDANTS

DOUGLAS L. C. JONES*

It is with a great deal of temerity that I as a trial judge discuss the effects of the landmark decision of the United States Supreme Court on March 18, 1963, *Gideon v. Wainwright*.[1]

I have pondered the effect of this decision and have become conversant with many articles written by persons including authors, teachers and attorneys who perhaps are better qualified to express an opinion of the decision than I with my little over ten years experience on the bench. However, after studying these many articles I have arrived at the conclusion that it appears like one of the lines in Shakespeare's plays, "full of sound and fury signifying nothing," or "Much Ado About Nothing."

First it is my opinion that the United States Supreme Court is only requiring "due process of law." Let us not be confused by words or argue over semantics. We should forget the *words* and what they imply—or what the writers, teachers and judges *believe* they connote or imply. Is not the real question whether an individual accused of a crime (whether denoted a "felony" or a "misdemeanor") is accorded the full measure of rights to which he is entitled? Thus, the crucial question remains: Was there "due process of law"? The matter of extending justice to the indigent defendant should not be made to turn upon whether the Supreme Court has ruled directly on such and such a point, or whether the defendant has a right to counsel under certain amendments to the Constitution when charged in a state court with having committed a misdemeanor. Rather, we as attorneys and most of all as judges should "face the music": Due process of law or equal justice for all.

Our adversary system of law demands a fair trial and substantial equivalence of opponents. In my opinion there is due process of law where each party is adequately prepared to elicit the facts and advance its cause "at the first opportunity." Some attorneys and authors would haggle over the words "first opportunity." But again if we firmly believe in due process of law and equal justice for all, would not the first opportunity to provide

* Judge of the Circuit Court, Division No. 5, Clayton, Missouri.
1. 372 U.S. 335 (1963).

a defendant with counsel be when defendant is arrested? This may be impossible or impractical. And the many cases cited by authors always get back, in my opinion, to procedural law. Again, words.

The rules that are set out by our higher courts must, in my opinion, be followed. But the heart of the problem remains: Due process or substantive law. The "right to counsel" clause of the Constitution and how that clause should be interpreted again deals in semantics. My opinion is that we as judges should interpret this to mean that a defendant shall have the right to counsel in every type of prosecution. This right to counsel is under all the decisions a substantial one. And if we were to follow "equal justice for all" this could not be satisfied by mere token, formal, perfunctory or casual representation. It cannot be a mere sham or mockery but should mean "effective assistance of counsel." The equal protection clause of both the federal and state constitutions means, in my opinion, *equality* rather than *identity* of treatment—"equal justice under law," just as it appears over the Supreme Court building in Washington, D. C.

We should not as judges or advocates be satisfied by merely ascertaining that the bare minimums set out in the holdings or dicta of the Supreme Court of the United States are met, but we should inquire, ascertain, and make sure that the defendant has "equal justice under law," what is just and fair.

We have seen the interpretations, suggestions and opinions of the many writers following this well-known case of *Gideon.* Ah, yes, some of the writers even refer with eloquent excerpts from the Bible in attempting to have the readers believe that the Gideon of Supreme Court fame was like the sixth Judge of the Bible, wherein the Lord spoke to Gideon and Gideon in turn with some 300 men defeated the many thousand Midianites. Readers of the aforesaid are likely to believe that this decision by the United States Supreme Court has changed the substantive law, whereas it has always been my belief since a student of constitutional law in law school, that the court cannot and never does make new law. It merely "peers more closely when it upsets an old and longstanding decision and with a clear gaze restates the law as it really was all the time."

Were we not told that the courts are unlike a legislature when it enacts a new statute and which under our American law can never be retroactive? Then the question still remains, as some writers insist that it does, that if the Supreme Court sets forth certain rights of defendants as being the law all the time, it could therefore and should be and perhaps may be applied retroactively. Then our old Grecian lady, Pandora, comes

into this picture. The box that Zeus, King of the gods, gave her is now open. Question: What happens to the many thousands upon thousands of persons who were defendants in criminal cases and did not have the benefit of counsel at all "critical stages" of the case? Would this not be an impossible interpretation? I reiterate that the Supreme Court in its opinion of March 18, 1963, merely stated what the law was all the time. And I hope that we as trial judges have seen fit that defendants have had the benefit of counsel at all "critical stages."

We as trial judges are properly pre-occupied mainly with the preservation of the right to an impartial trial. We constitute the forum which has been dedicated to that purpose, as the Constitution specifically provides for a fair and impartial trial in criminal proceedings. While conducting a criminal hearing this is our major function, our job. There is no use deluding ourselves that this is NOT a difficult job. The trial courts have been constituted for the purpose of determining disputes and for determining guilt or innocence. We might be likened to the substitute for the armed conflict. It is in our courtrooms that one gets the smell of the battlefield of justice. The trial judge is like the man with the rifle in the military system: You can't get along without him no matter what else you have. It is upon this level that equal justice under law is administered. With all modesty I firmly believe that the office of state trial judge in a court of general jurisdiction is the highest judicial and legal office in the gift of mankind. It is from our benches that we may view the whole range of human conduct and emotion. It is we as judges who have to face each day with a full portion of courage for it is we who have to look full-face into the eyes of all and say "no" to those against whom our decision is made. We must of necessity sit alone and sit up straight leaning neither forward nor backward. Time and again it is we that have to make those decisions which determine the future of the lives of those who come before us in court.

The public who view the courts view the man that sits as judge by his conduct, his self-restraint, his dignity, and his impartiality. By his actions, therefore, a trial judge must maintain and build the respect of the community for all courts and for all law. We need not try to be great judges, but we should aspire to be good judges. Even though the work of a trial judge at times may be more or less unsung it doesn't make his work any less fundamental. This is the court which the public sees, where the witnesses go, most of whom are laymen. And again the work of this court is the basis on which the public will come to judge the administration of justice. In this field of technical law and fine distinction of fact, we at times

comfort ourselves with the knowledge that if we err—and we probably will and have many times—our error we hope is in the noble cause of protecting human rights or in the equally worthwhile cause of punishing an enemy of society. As trial judges then we must ask ourselves: "What ethical considerations may be involved in cases where indigent defendants are brought before us? What is the professional responsibility of members of The Missouri Bar and what should they as members expect from the court when they represent an indigent defendant?"

Now I have not attempted to give any suggestion or answer to the problem of monetary payment or costs involved by counsel representing indigent defendants. All I am attempting to state for the record is that we as trial judges should be concerned with the problem, and ask ourselves the fundamental question, "Is this due process of law and equal justice for all?"

It appears to me to be unimportant whether counsel has been appointed at what someone might interpret as the first "critical stage" of the criminal cause, which of course would be at the time of arrest or again at the preliminary hearing. The problem and only problem must be: Is this "equal justice for all?" Have the rights of the defendant been prejudiced? If they have not, then it is this writer's opinion there has been due process.

Our Attorney General on the 21st of June, 1963, stated in an opinion that magistrates were under a duty to explain to accused persons their right to free counsel if unable to hire a lawyer. The opinion goes even further and states that magistrates have the power in misdemeanor cases to appoint counsel for indigent defendants.

I believe it was Mr. Justice Sutherland back in 1932, in *Powell v. Alabama,* who stated that the defendant "requires the guiding hand of counsel at every step in the proceedings against him."[2] Now aren't we again dealing in semantics?—"critical stages" of the proceeding or as Justice Sutherland said in '32 "every step" of the proceeding. I am sure it would be agreed by all indigent defendants as well as most of the defense counsels with whom I have had the opportunity to discuss these cases, that the most critical stage of the proceeding is immediately after arrest. As Mr. Justice Douglas stated in his opinion in *Crooker v. California,*[3] "A person accused of crime needs a lawyer right after his arrest probably more than at any other time."

Now if we trial judges would follow to the letter these opinions it would appear that a lawyer should be available to the indigent defendant at the

2. 53 S.Ct. 55 (1932).
3. 357 U.S. 433 (1958).

time of his arrest. I am sure all law enforcement officials including police would be of the opinion that this would cause a real peril to the solution of crime, and needless to say it would be quite impracticable to attempt to assign counsel, whether a public defender, a friend of the court, a volunteer or anyone else immediately after the arrest of a defendant. We have learned from articles and from experience as trial judges that many crimes appear to be solved solely because the police obtained a confession from the defendant. Now the Supreme Court has been very careful to rule upon the admissibility of such a confession whether it was obtained under duress, et cetera. Again I would say we are arguing over words. The problem remains: Were the rights of the defendant prejudiced? Was this due process and equal justice for all?

We have been fortunate as trial judges in Missouri to have received directions through the rules of the Supreme Court calling our attention to the minimum requirements that we as trial judges must follow in the event we have a defendant who appears before us without counsel and upon inquiry advises us he is indigent. But shouldn't we as trial judges, in order to take responsibility and criticism, in order that due process and equal justice for all be maintained, ascertain that the appointed counsel (whether he be a public defender or a court appointed attorney serving without actually volunteering his services but without remuneration), have the benefit of investigatory services? We all know the benefit of such services such as pre-trial discovery and of the services of experts at pre-trial and trial stages—just as we know the surgeon benefits immeasurably from pre-operation diagnosis by medical specialists as well as by the services of X-ray and other technicians who assist him during the operation. No competent surgeon would perform an operation without these vital services. To the same degree, the trial attorney should have available to him the services necessary to the adequate representation of his client. In my opinion, we are not following due process and equal justice for all if we merely appoint a member of the bar to defend an indigent defendant. Can it be said we are guilty of omission instead of commission in assigning counsel at the time of arraignment rather than at the preliminary hearing, which involves a delay of days or weeks during which the defendant has been incarcerated without the assistance of counsel. This is a social as well as judicial problem.

However, again the obligation is one of government, whether it be federal, state or county. It, in my opinion, is not one of the local bar. Aren't we, when we appoint an attorney to represent an indigent defendant without compensation or reimbursement for expenses, violating the clauses

of the federal and state constitutions which prohibit the taking of life, liberty or property without due process of law? When one considers the high sum spent on public education, health and welfare each year over the state and nation by local, state and federal government, and the vast sums spent to prosecute, to judge, punish, rehabilitate and parole persons caught in the criminal process, an expenditure of so many dollars a year for protecting the constitutional rights of indigents accused of crime should not be out of line, and some fund should be set up for this purpose.

Perhaps the General Assembly could be asked to amend the law to permit fines, penalties and bond forfeitures to be used to defray at least a part of the cost of providing adequate representation and related services for the indigent accused. In my opinion, and I am sure in the opinion of many others, the needs of indigents accused of committing an offense to have access to legal assistance in order to obtain justice, "due process of law, equal justice for all" is no different in quality from the need for clothing, shelter, food and medical care. And the courts have said many times that the duty to provide counsel and legal assistance rests upon the government whether it be federal, state or county. Following these statements by higher courts it is my opinion that we judges do not have any more right to compel a person to give of his legal talents to represent an indigent defendant than the federal, state or county government has to require a physician to perform an operation on an indigent without a fee. We know that when the federal, state or county officials contract to purchase groceries for the welfare agencies they expect to and do pay for the same. Likewise then, government on whatever level it may be, should go to the same market place for the necessity that we know as "justice for the poor." In other words, it is my opinion that just as some counties have set up the public defender system and expect the taxpayers to pay for the services, other communities should expect that a lawyer called upon to give of his legal services or talents for an indigent defendant should expect to be remunerated.

But what should we judges consider when confronted by an indigent defendant? Having just finished a year in the criminal division of a multiple circuit court and having disposed of more than 308 felony cases, it has become more apparent than ever to me that a judge sitting in a criminal division has a terrific responsibility to each and every defendant who appears before him. I then suggest that we as circuit court judges, having as the Supreme Court indicates supervisory control over the magistrate courts, direct by court rule or otherwise that the magistrate courts, being courts

of record, should use our State Board of Probation and Parole personnel to ascertain at the first instance, when a defendant is brought before the magistrate for preliminary hearing on a felony warrant, whether due process and equal justice will be the order of the day. The magistrate should, in my opinion, decide first whether the defendant is indigent. This decision of the magistrate would not of course be binding on the circuit court but would be of great assistance in the administration of justice and would be a step in the right direction. Secondly, and I believe this is most important, if the defendant is indigent the magistrate should determine whether he should not be admitted to bail on his own recognizance. I am sure that this question could be answered within a few hours by having an officer of the State Board of Probation and Parole make some preliminary calls; and this in turn (although not binding on the circuit court in the event the defendant is bound over) would give the defendant an opportunity to secure legal counsel. It is plain that a defendant can rarely act upon his own to secure counsel if he is confined and unable to make bond.

In conclusion, I reiterate that we as trial judges should, in order that due process of law and equal justice for all prevail, ascertain that the defendant who appears to be indigent before us actually understands that in the event he does not have counsel the court will appoint an attorney to represent him whether it be by a public defender system, as we have in the multiple Twenty-first Judicial Circuit, or by a court-appointed attorney. And if we as judges take our jobs seriously and always bear in mind that under the Constitution the defendant is entitled to, and expects, an impartial and unprejudiced application of due process of law or equal justice, then I am confident that not only will the defendant's fundamental rights have been perserved, but the community as a whole will know and understand that anyone, rich or poor, brought before a court of justice stands on the same footing: "Due process under law, equal justice for all."