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Constitutional Law—Equal Protection and Due Process of Law—Appeal by Indigents

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stitute a waiver. It then weighed the public and private interests to arrive at the result that Smith had not forfeited his right to attack his Virginia conviction by becoming a fugitive from justice.

The court considered that its decision might result in an increased flow of habeas corpus petitions (which was one thing that the 1948 revision sought to cut down); that the decision certainly would not deter escapes from prison; and that it would be desirable that Smith's conviction be reviewed by a Virginia court or a federal court sitting in Virginia, which would have a familiarity with the customs and practices in Virginia, enabling it better to evaluate the testimony and records. Against these considerations stood the prospects that, if the court denied the petitioner's writ and if Smith's allegations were true—a thing which could only be determined by a hearing on the merits—an innocent man convicted of crime in violation of substantial constitutional rights would unjustly suffer the severer penalties meted out in New York to second offenders. Further a state court's laxity in the protection of constitutional rights would be sanctioned.[17]

It would seem harsh and unjust under circumstances like those of this case to apply a mechanical and inflexible rule so as to deny at least a hearing on the merits. The federal district court may always deny relief after the facts are considered.

But, would the decision in the case have been different if a few, half, or most of the factors which the court considered in entertaining the petition had not been present? How substantial must be the constitutional right which is claimed? Where is the dividing line past which a petitioner's prior conduct will estop him from claiming that he has been denied a constitutional rights? These questions, and others, remain to be answered.

JOHN F. BLACKWOOD

CONSTITUTIONAL LAW—EQUAL PROTECTION AND DUE PROCESS OF LAW—APPEAL BY INDIGENTS.—Petitioners were convicted of armed robbery in Illinois. Immediately upon conviction they filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost, alleging that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal. . . ." Under Illinois law it is necessary for a defendant to furnish a bill of exceptions or a report of proceedings at the trial certified by the trial judge in order to get an appellate review.[1] These are often impossible to prepare without a stenographic transcript of the trial proceedings, and counsel for Illinois did not deny that one was needed by petitioners. Indigent defendants sentenced to death are afforded a free transcript, but the others must pay for their own.[2] Upon denial of their motion by the trial court, the petitioners filed under the Illinois Post-Conviction Hearing Act,[3] which pro-

[17] United States *ex rel.* Smith v. Jackson, 234 F.2d 742, 748 (2d Cir. 1956).

[1] ILL. REV. STAT., c. 110, § 101.65 (Supreme Court Rule 65) (1955).
[2] ILL. REV. STAT., c. 38, § 769a (1955).
[3] ILL. REV. STAT., c. 38, §§ 826-32 (1955).

vides that an indigent may obtain a free transcript under certain circumstances, if Illinois or federal constitutional questions are raised.[4] The petitioners alleged that there were nonconstitutional errors in the trial which would entitle them to have their convictions set aside on appeal, that the only impediment to full appellate review was their lack of funds to buy a transcript and that such refusal to afford appellate review solely because of poverty was a denial of federal due process and equal protection. This petition was also denied. The Illinois Supreme Court affirmed the dismissal solely on the ground that the charges raised no substantial constitutional questions. On certiorari to the United States Supreme Court, *held,* judgment vacated and remanded. A state that conditions appellate review in such a way as to discriminate against some convicted defendants on account of their poverty violates the equal protection and due process clauses of the fourteenth amendment. *Griffin v. Illinois,* 351 U.S. 12 (1956) (Justice Frankfurter, concurring separately; Justices Burton and Minton, joined by Justices Reed and Harlan, dissenting; Justice Harlan, dissenting separately).

This decision comes as a logical step in the "unfolding content" of due process and equal protection, which are living concepts constantly changing to conform to current social requirements.[5] The concessions of the Magna Charta were a strong early step toward providing equal justice for all.[6] Another major step was the fifth amendment with its due process of law clause and the sixth amendment with its provision granting an accused the right to counsel in the federal courts. Then came the fourteenth amendment, the basis of this decision, which was at first intended solely for the benefit of the Negro race, granting them equal rights with other citizens.[7] It soon came to have a much broader application. In *Powell v. Alabama* the right of the accused to have counsel was found to apply in some cases to proceedings in state courts.[8] In 1955, a United States District Court dismissed an indictment for filing false and fraudulent income tax returns on the ground that the defendant was deprived of effective counsel when his assets were impounded by the Government leaving him unable to hire an accountant in a case where refutation of the Government's claim would have required the assistance of an accountant.[9]

[4]ILL. REV. STAT., c. 37, § 163f (1955), provides in effect that, if in the opinion of the trial judge the post-conviction petition is sufficient to require an answer, a free transcript may be provided.

[5]Wolf v. Colorado, 338 U.S. 25, 27 (1949): "Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."

[6]Sections 39, 40. "To no one will we sell, to no one will we refuse, or delay, right or justice. . . . No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him or send upon him, but by the lawful judgment of his peers or by the law of the land."

[7]Slaughter-house Cases, 83 U.S. (16 Wall.) 36, 81 (1872): "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

[8]287 U.S. 45, 71 (1932): ". . . in a capital case where the defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . 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. . . ."

[9]United States v. Brodson, 136 F. Supp. 158 (E.D. Wis. 1955).

Despite the expanding concepts of due process and equal protection, the instant decision undoubtedly came as a surprise in jurisdictions which have held, as Minnesota has, that "the U.S. Constitution does not require a state to provide the expenses of an appeal for an indigent defendant in a criminal case, and the constitution and the statutes of this state neither compel nor authorize such procedure."[10] With respect to even further broadening of the scope of due process and equal protection, the fourteenth amendment has been suggested as a means to require the states to provide legal aid to the impoverished in civil cases.[11]

The majority opinion states that in criminal trials a state may not discriminate on account of poverty any more than on account of religion or color. It applies this principle to prevent the states from making the lack of means of one convicted of a crime a bar to an appellate review, when he is in other respects entitled to one. The Court did not prescribe the manner in which such "invidious discriminations" should be remedied, but left the method to be used to the states.[12] It should be noted that the Court did not say that a state must grant appellate review, but that if it does it must not discriminate against anyone because of his poverty.

The dissenting opinion of Justices Burton and Minton argues that a state "is not bound to make the defendants economically equal before its bar of justice." This may be true, but even they admit that it is a desirable social policy, and the Court, by extending the broad provisions of the Constitution to apply to this situation, took another step toward giving all people, regardless of financial standing, an equal chance for justice. It is not too great a step from granting an accused the right to counsel where it is considered unfair to require him to defend himself to the granting of appellate review to those hitherto prevented from having one only by the price tag.[13]

The majority opinion applies both the equal protection and the due process clauses without articulating its reasons. Justice Harlan, in his separate dissenting opinion, says that it is not an equal protection question at all, but rather a due process question. He argues that Illinois has made no "classification" imposing legal disabilities as is contemplated by the equal protection clause, but rather that the decision is based on the state's failure to remove the natural disability of being poor. He reasons that if the court can find an "invidious classification" between "rich" and "poor" with respect to requiring a person convicted of a felony to purchase a transcript before he can appeal, one must also conclude that requiring tuition fees to attend a state university is an "invidious classification." Therefore, he argues, the real basis of the majority opinion is that "it violated 'fundamental fairness' for a state which provides for appellate review, and thus

[10]State *ex rel.* Koalska v. Rigg, 74 N.W.2d 661, 662 (Minn. 1956); State v. Lorenz, 235 Minn. 221, 50 N.W.2d 270, 271 (1951).

[11]Note, 9 U. FLA. L. REV. 67 (1956).

[12]Illinois might supply transcripts under the Post-Conviction Hearing Act because of the United States Supreme Court's holding that constitutional rights were violated. Or it may find that "bystander's bills of exceptions or other methods of reporting trial proceedings" could be used. Or the legislature could enact a statute authorizing the trial judge to grant a free transcript to indigents convicted of any crime.

[13]A law nondiscriminatory on its face may be grossly discriminatory in operation. Guinn v. United States, 238 U.S. 347 (1915).

apparently considers such review necessary to assure justice, not to see to it that such appeals are in fact available to those it would imprison for serious crimes."

What the Court has done is to extend equal protection, in a situation where social considerations demand it, to include the classification of people which inevitably results from economic inequality. There is a fundamental difference between entering a state university and appealing a criminal conviction. The former is purely a privilege, while the latter has for all practical purposes become a right.

Justice Harlan further says that Illinois did not violate the due process clause, which guarantees the right not to be denied an appeal for arbitrary or capricious reasons, because no such arbitrariness exists in the Illinois appellate system, since the failure to give free transcripts is based upon a real, if unenlightened, economic reason. But even if it is considered a due process question, can it not be that our social standards have advanced to the point where the denial of an appeal in these circumstances would be a "denial of fundamental fairness, shocking to the universal sense of justice?"[14]

The effect of the decision has already been felt in at least two states other than Illinois. In New York, where a statute provides that a poor person may appeal without paying fees, except that a court order is required to obtain the stenographic minutes, a county court's ruling had stood since 1943 that only where a judgment is for death or for life imprisonment does the court have the power to furnish, free, a transcript of the minutes pursuant to the statute. In June, 1956, a defendant convicted of burglary in the third degree, who filed a request for a copy of the stenographic minutes of the trial for the purpose of further review of his case, was furnished a copy of the record without cost.[15] The court based its decision squarely on the principal case.

In another recent case a prisoner appealed to the Oregon Supreme Court from a dismissal of a writ of habeas corpus, claiming that the judgment under which he was convicted was void.[16] Oregon law requires a bond to be posted for the amount of appellate costs before an appeal can be perfected.[17] The court allowed the appeal, waiving the requirement of the bond, saying that the United States Supreme Court, having decided as it did in the principal case, would surely "hold that a pauper . . . would be entitled

[14]Betts v. Brady, 316 U.S. 455, 462 (1942).

[15]People v. Jackson, 152 N.Y.S.2d 893 (1956); N. Y. PEN. LAW, § 1045a; N. Y. CODE CRIM. PROC. §§ 308, 485.

[16]Barber v. Gladden, 298 P.2d 986 (Ore. 1956).

[17]ORE. REV. STAT., §§ 19.030(4), 19.040 (1955). At the present time the federal courts (58 STAT. 5 (1921), 28 U.S.C. §§ 753(f), 1915(a) (1952)) and 29 states provide free transcripts of right to indigents convicted of noncapital crimes. Besides the 29, at least five states have given the trial courts discretionary power to order free transcripts in noncapital cases, and the Rhode Island Supreme Court has reached a similar result by interpretation of statute. There is some indication of a similar result in Connecticut. Instant case at 33 n. 4. Montana has a statute providing that "If it appears to the judge that a defendant in a criminal case is unable to pay for (a copy of the record), the same shall be furnished him and paid for by the county." REVISED CODES OF MONTANA, 1947, § 93-1904.

. . . to the waiver of the requirement of a bond for costs if such waiver is necessary to the presentation of his appeal.'"[18]

This decision will have the general effect of tending to eliminate any instances where a defendant convicted of a crime is prevented from appealing to the appellate court of his state solely on the ground that he is not financially able to purchase a transcript of the trial record, put up security for an appellate bond, or pass any other financial hurdle erected by the laws of his state. This result is desirable[19] and the case will undoubtedly hasten the time when all of the states will have a simple, efficient system of allowing an indigent full appellate review of his conviction in a criminal court, where there is merit in his appeal.[20] If the Court really meant that this was an equal protection question, as well as a due process question, both concepts of constitutional guarantees were extended into the new area of economic inequality, where the possibilities of application are virtually unlimited.

GEORGE DALTHORP

CORPORATIONS—CUMULATIVE VOTING—STAGGERED ELECTIONS AND CLASSIFICATION OF DIRECTORS—Louis Wolfson, a minority owner of common stock of Montgomery Ward and Co., and in the midst of a proxy fight with the management for the control of the board of directors, had protested to the defendant, Sewell Avery, that the by-law of Montgomery Ward which authorized the election of only one-third of the company's nine directors each year was illegal. Subsequently he brought action seeking a declaratory judgment to the effect that a provision of the Illinois Constitution[1] guaranteeing the right to vote cumulatively in the election of corporate directors was violated by the Illinois Business Corporation Act, section 35,[2] and the

[18]The court is probably right. "Surely no one would contend that either a state or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right . . . to defend themselves in court. . . . There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." Instant case at 17.

[19]The following are possible objections to the decision: (1) *The decision is an example of federal meddling in state affairs.* But the states are not free to deprive their citizens of rights guaranteed by the Federal Constitution. (2) *It will impose great expense on the states.* Since a majority of the states do make provisions for furnishing indigents with transcripts, the others should be able to, also. In addition there may be other ways in which a state may allow an indigent to appeal which are less expensive. (3) *It may result in the states' limiting the right to appeal.* This seems unlikely since society has come to consider appeals as essentially a right. (4) *Prisoners now in confinement will ask for free transcripts so they may appeal also.* Practically forbids the states' allowing this. One rationalization is that the prisoners waived their right to a free transcript by not making a timely request. Perhaps a more realistic one is that the decision is effective only for the future and is not retroactive, being in fact a new rule rather than a discovery of what has always been the law.

[20]The majority opinion states that the petitioners had alleged that there were errors in the trial which entitled them to have their convictions set aside on appeal and that these allegations were not denied. Therefore, it was assumed that there was merit in the appeal in the instant case. It is a reasonable conclusion that this decision may apply only where there is apparently merit in an appeal.

[1]ILL. CONST. art. XI, § 3.

[2]ILL. ANN. STAT. c. 32, § 157.35 (1954).