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Beaney: The Right to Counsel in American Courts

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THE RIGHT TO COUNSEL IN AMERICAN COURTS. By *William M. Beaney.* Ann Arbor: University of Michigan Press. 1955. Pp. 268. $4.50.

The Sixth Amendment to the Federal Constitution provides, inter alia, that an accused in a criminal proceeding "shall enjoy the right . . . to have the Assistance of Counsel for his defense." For almost a century and a half after its ratification, this provision received only negative application, i.e., the federal courts could not preclude a defendant in a criminal trial from retaining counsel if he so desired. On the other hand, his voluntary failure to do so because of financial or other considerations, raised no constitutional issue.

However, in 1938 the case of *Johnson v. Zerbst*[1] reached the Supreme Court where the issue as to whether the failure to appoint counsel was a jurisdictional defect in the constitutional sense was directly posed. Despite a dearth of precedent, the Court, speaking through Justice Black, held that "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[2] That decision reflected a substantial broadening of the concept of what constitutes a fair trial and serves as the bellwether of Dr. William M. Beaney's detailed and intelligent study of a suddenly pertinent constitutional safeguard.

The decision in *Johnson v. Zerbst,* like that in *Erie Railroad v. Tompkins,* decided in the same year, was unexpected. Outside of some isolated dicta in several cases involving mob-dominated trials,[3] only *Powell v. Alabama*[4] stood between the Court and a total lack of precursory decisions. However, the compelling and eloquent language of Justice Sutherland in that case, obiter dicta

[1] 304 U.S. 458, 58 S.Ct. 1019 (1938).

[2] Id. at 463.

[3] See Holmes' dissent in Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582 (1915); Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265 (1923); Downer v. Dunaway, 53 F. (2d) 586 (5th Cir. 1931).

though much of it may be, did much to construct a suitable springboard for the Johnson majority.

Powell v. Alabama, popularly known as the Scottsboro case, involved the trials, for rape, of nine Negro defendants, eight of whom were convicted in four separate trials which occurred on the very day of arraignment. No attorney answered or appeared for the defendants, except that a Tennessee attorney by the name of Roddy volunteered to assist court-appointed counsel. After some desultory attempts by the trial court to enlist the entire local bar on behalf of the defendants, all of whom were illiterate and youthful, an aging, half-hearted Scottsboro attorney volunteered to help Roddy. Appeals to the Alabama Supreme Court were denied in seven of the convictions, the exception being that of a thirteen-year-old defendant.

The United States Supreme Court sustained the appellants' contention that there had been a denial of due process because "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance . . . , 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 time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[5]

Sutherland's definition of "ignorance"[6] was so broad that it in effect placed every layman in the category of the Scottsboro defendants. Dr. Beaney, with the omniscience of hindsight, is quick to recognize the sweeping implications of Sutherland's gratuitous remarks about the plight of unaided defendants in criminal cases. Such implications were, however, not perceived by many of the contemporary writers.[7]

Six years later *Johnson v. Zerbst* reached the Court. This case had its origin in November of 1934 when two Marines were arrested in South Carolina and charged with uttering counterfeit notes. With the exception of an attorney who represented them at their preliminary hearing before a United States Commissioner, they were without counsel for all subsequent proceedings. Two days after their indictment, the defendants were tried, convicted and sentenced to four and one-half years in jail. Several months later, they petitioned for a writ of habeas corpus,[8] basing their contention on the fact that they had neither been offered counsel by the trial court nor been advised that they were entitled to a court appointment. Furthermore, they claimed that they had asked the United States attorney to obtain counsel for them but that he had refused on the ground that such a practice did not prevail in South Carolina in non-capital cases. In denying their application, the district court held that despite

[4] 287 U.S. 45, 53 S.Ct. 55 (1932).
[5] Id. at 71.
[6] Id. at 69.
[7] 18 IOWA L. REV. 383 (1933); 21 CALIF. L. REV. 484 (1933).
[8] Bridwell v. Aderhold, (D.C. Ga. 1935) 13 F. Supp. 253.

the fact that petitioners had been "deprived of their constitutional rights,"[9] it was compelled to reach an adverse decision solely because they had chosen an improper remedy.

The Court of Appeals for the Fifth Circuit affirmed the lower court, but insisted that its obiter dictum with reference to the duty of the trial court to provide counsel in every federal criminal proceeding whether requested or not was unsupported decisionally.[10] The Supreme Court reversed, holding that "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[11]

Thus, without having to overturn a substantial body of decisional law, the Court was able to raise the right to counsel in federal courts to a level which it had never even remotely attained since the ratification of the Bill of Rights.

Black went even further and suggested that the trial record would have to contain evidence of a positive character with reference to waiver in order to meet the requirements of the new rule he was enunciating. He did not attempt to particularize the nature of this evidence, but in a later case the Court held that a plea of guilty by a defendant who had not been informed of his right to counsel was not tantamount to waiver.[12] Further conjecture, however, became academic in view of rule 44 of the Federal Rules of Criminal Procedure, enacted in 1946 as a direct result of *Johnson v. Zerbst*[13] which requires that defendants be advised by the court of their right to counsel and that they must be supplied with legal assistance if they are indigent unless they elect otherwise.

On the state level, the problem still remains acute in view of the inapplicability of the Sixth Amendment to state court proceedings.[14] All states provide counsel for poor defendants in capital cases but very few do so in less serious proceedings, and those that do insist upon an express request by the accused. It is here that Dr. Beaney is obviously most concerned and he does an extremely competent job in tracing the impact and effect of the due process clause of the Fourteenth Amendment in this area. In this connection, he makes reference again to *Powell v. Alabama* whose reasoning, he feels, should have been immediately extended to include all criminal proceedings, not merely those involving capital crimes.

That it was not is a source of keen disappointment to him. The Supreme Court has refused to apply Sutherland's standard in all noncapital cases unless

[9] Id at 255.

[10] Johnson v. Zerbst, (5th Cir. 1937) 92 F. (2d) 748 at 751.

[11] Johnson v. Zerbst, 304 U.S. 458 at 463, 58 S.Ct. 1019 (1938).

[12] Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574 (1941).

[13] Walker v. Johnston, supra note 12, and Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942) were also influential.

[14] See Massey v. Moore, (5th Cir. 1953) 205 F. (2d) 665.

the record indicated other prejudicial circumstances such as the extreme youthfulness of the defendant[15] or material judicial errors.[16] As Justice Roberts put it in *Betts v. Brady*,[17] a robbery case which reached the Court in 1942, it was only "in certain circumstances, or in connection with other elements" that a denial of a specific provision of the Bill of Rights was also a denial of due process.[18] Therefore, the refusal of the trial court to appoint counsel as requested by Betts had to be "tested by an appraisal of the totality of facts in a given case."[19] Accordingly, the Court held that the constitutional rights of a literate and intelligent defendant had not been violated by the lower court's action.

Most of Dr. Beaney's treatise is written with scholarly detachment and he strives to maintain objectivity. However, his sensibilities are apparent throughout and, in his concluding chapter, he cannot withhold his disapproval of the Supreme Court's reluctance to proceed to what he considers the logical limits of the *Powell* case, namely to require that counsel be available to indigent defendants in any state criminal proceeding unless there is a positive waiver of this right. It does seem that a state defendant should not be in a worse position than his federal prototype and it is not difficult to agree in spirit with Dr. Beaney's thesis that anything less than the *Johnson v. Zerbst* standard is a denial of due process. However, the cases are against him and there is no indication of any significant change in the offing.[20]

Although he expends very few pages on the methods of selecting counsel, Dr. Beaney is convinced that, with rare exceptions, an indigent defendant has to be content with young and inexperienced counsel in all but those capital cases where the publicity is enough to attract leading members of the bar. He feels that it is too early to determine whether the legal aid societies which have proved so effective in New York City and Philadelphia, or the California public defender plan will furnish a universal solution to the problem. Perhaps the New Jersey system which provides for the rotation of attorneys from local bar association rosters is the right answer. The author does not advocate one method over another but he does suggest that immediate and extensive consideration of the entire situation is urgently needed. Even if the Supreme Court does not hold that every indigent defendant facing trial in a state court must, in the

[15] See Wade v. Mayo, 334 U.S. 672, 68 S.Ct. 1270 (1948).

[16] See Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948) (facetious remarks during sentencing); Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256 (1948) (misinterpretation of Pennsylvania Habitual Criminal Act).

[17] 316 U.S. 455, 62 S.Ct. 1252 (1942).

[18] Id. at 462-463.

[19] Id. at 462.

[20] See Bute v. Illinois, 333 U.S. 640, 68 S.Ct. 763 (1948); Quicksall v. Michigan, 339 U.S. 660, 70 S.Ct. 910 (1950); Baker v. Jamison, 72 S.D. 638, 38 N.W. (2d) 441 (1949); Ex Parte Johnson, 153 Tex. Cr. 619, 224 S.W. (2d) 240 (1949); Robinson v. Smyth, 190 Va. 724, 58 S.E. (2d) 4 (1950).

absence of an express waiver, be provided with counsel, it should insist that those entitled to representation be assigned competent and interested attorneys.

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