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The Right to Counsel Prior to Trial in State Criminal Proceedings

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COMMENTS

THE RIGHT TO COUNSEL PRIOR TO TRIAL IN STATE CRIMINAL PROCEEDINGS

INTRODUCTION

In *Gideon v. Wainwright*,[1] the Supreme Court has finally secured the unqualified right to be represented by counsel at trial to the indigent defendant in state criminal proceedings.[2] The long road to this decision has not been smooth. The right to counsel in state criminal proceedings made its first major appearance in the landmark case of *Powell v. Alabama*.[3] Although a cursory examination of *Powell* leads to the conclusion that the right in capital cases was somewhat limited,[4] the Court

1. 83 S. Ct. 792 (1963).

2. *Ibid.* Gideon was charged with having broken and entered a poolroom with the intent to commit a misdemeanor. This offense is a felony under Florida law. He appeared in court and asked to have counsel appointed for him, a request which was denied. Gideon proceeded to conduct his own defense and did so "about as well as could be expected from a layman." *Id.* at 792-93. The jury returned a verdict of guilty and Gideon was sentenced to five years in the state prison.

The Court considered the facts in *Betts v. Brady* as "strikingly like the facts upon which Gideon here bases his federal constitutional claim." *Id.* at 793. In view of the similarities the Court was confronted with the question whether *Betts* should be overruled.

The Court decided that the *Betts* opinion "was wrong . . . in concluding that the Sixth Amendment's guarantee of Counsel is not one of these fundamental rights. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.* at 795-96. In conclusion the Court stated that "*Betts* was 'an anachronism when handed down' and . . . it should now be overruled." *Id.* at 797.

Justice Harlan in his concurring opinion considered *Betts* "entitled to a more respectful burial than has been accorded. . . ." *Id.* at 799. He pointed out that "the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded. . . . The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial." *Id.* at 800. He continued to state that "whether the rule should extend to *all* criminal cases need not now be decided." *Id.* at 801.

Justice Harlan concluded by clarifying his position as distinguished from the majority of the Court. He recognized the right to counsel as a fundamental right. However, he did not agree that "we automatically carry over an entire body of federal law and apply it in full sweep to the States. . . . In what is done today I do not understand the Court . . . to embrace the concept that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such." *Id.* at 801.

Mr. Justice Clark, concurring in the result, pointed out that the results of the right to counsel decisions had rested upon the capital-noncapital distinction. He expressed the view that "the Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority." *Id.* at 799.

3. 287 U.S. 45 (1932).

4. "All that 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. . . ." *Id.* at 71.

chose to make that right absolute in subsequent capital cases.[5] However, in *Betts v. Brady*,[6] a noncapital case, the Court decided that the right to have counsel appointed at trial was subject to a highly flexible standard. This standard demanded that the right was to be determined by an appraisal of the facts in deciding whether the denial of appointed counsel amounted to a lack of "fundamental fairness, shocking to the universal sense of justice . . . ."[7] In noncapital cases subsequent to *Betts*, the Court did not choose to make that accused's right to counsel absolute as it had done in capital cases subsequent to *Powell*,[8] thereby creating a distinction between the right to counsel in capital and noncapital cases. This distinction had been criticized so vehemently over the past twenty years[9] that the Court in *Gideon* overruled its decision in *Betts*, and eliminated the flexible standard employed in that case for determining the indigent's right to counsel at his trial in noncapital cases.[10]

In view of the Court's decision to do away with the capital-noncapital distinction at the trial level, this comment will concern itself with an accused's constitutional right to be represented by counsel at the pre-trial stages of state criminal proceedings. As Justice Black stated in *In Re Groban*,[11] "the right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."[12]

I. POLICE INTERROGATION AFTER ARREST

Apparently even the right to retain counsel does not accrue during the interrogation period after arrest. The Supreme Court has twice considered the right to retain counsel at this early stage. In *Crooker v. California*,[13] the accused, a thirty-one-year-old college graduate who had completed one year of law school, was arrested for murder. After three successive interrogation periods he confessed. He had requested at

5. Hamilton v. Alabama, 368 U.S. 52 (1961); De Meerleer v. Michigan, 329 U.S. 663 (1947); Tomkins v. Missouri, 323 U.S. 485 (1945); Williams v. Kaiser, 323 U.S. 471 (1945).

6. 316 U.S. 455 (1942).

7. *Id.* at 462.

8. Carnley v. Cochran, 369 U.S. 506 (1962); Moore v. Michigan, 355 U.S. 155 (1957); Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951); Gibbs v. Burke, 337 U.S. 773 (1949); Marino v. Ragan, 332 U.S. 561 (1947).

9. "Twenty years' experience in the state and federal courts with the *Betts v. Brady* rule has demonstrated its basic failure as a constitutional guide. Indeed, it has served not to guide but to confuse the courts as to when a person prosecuted by a State for crime is entitled to a lawyer." Carnley v. Cochran, 369 U.S. 506, 518 (1962) (Black, J., concurring.) See also Beaney, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771 (1961); Rackow, *The Right to Counsel—Time for Recognition Under the Due Process Clause*, 10 W. RES. L. REV. 216 (1959).

10. See note 2 *supra*.

11. 352 U.S. 330 (1957).

12. *Id.* at 344. (Dissenting opinion.)

13. 357 U.S. 433 (1958).

least twice to call a named attorney, but to no avail. The Court considered this denial of retained counsel at the interrogation period in conjunction with the subsequent trial and concluded that the accused had received "that fundamental fairness essential to the very concept of justice."[14] Again, in *Cicenia v. Lagay*,[15] police authorities refused to allow an attorney, retained by the accused on the evening before he appeared at police headquarters, to confer with his client until after the interrogation period. The Court reached a conclusion consistent with *Crooker*, utilizing the same concept of fundamental fairness it had stated therein.

However, a different result apparently will occur if the interrogation is held after indictment. In *Spano v. New York*[16] the accused was arrested after indictment. He was intensively questioned in the period following his surrender. A confession was induced by an old friend who was a member of the police department upon the assertion that the officer would be in trouble with his superiors if the accused did not confess. The accused's request for his attorney was denied. The Court unanimously reversed the conviction, but disagreed as to the reasons for reversal. Five of the justices reversed because they found the confession inadmissible due to the circumstances under which it was produced. Four justices, however, reversed on the denial of access to retained counsel after indictment. In view of the position taken by Justice Warren[17] in *Crooker* and *Cicenia*,[18] apparently a majority of the Court would hold that after indictment it is a denial of due process to refuse a request to retain counsel.

The rationale behind the refusal of counsel during the interrogation period is perhaps best expressed by Justice Jackson in his concurring opinion in *Watts v. Indiana*:[19]

> To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.[20]

True, society has a great interest in solving its crime problem, but due process demands a favorable balance between society's interest and the

14. *Id.* at 439.
15. 357 U.S. 504 (1958).
16. 360 U.S. 315 (1959).
17. Justice Warren was with the majority in *Spano*.
18. Justice Warren was with the dissenters in *Crooker* and *Cicenia*.
19. 338 U.S. 49 (1949).
20. *Id.* at 59.

accused's individual rights. If due process provides the accused with certain rights, why should a policy be adopted which would not facilitate the defendant's awareness of those rights? Justice Jackson apparently recognized the accused's right "to make no statement to police under any circumstances" during interrogation and also the probability of his ignorance of that right, yet he advocates a policy which would encourage that ignorance.

"Under our adversary system" why should the state be given a "head start" in the search for the solution of a particular crime? The state is represented by skilled investigators, whereas the accused is forced to stand alone at least until the interrogation period has ended.

> [T]he layman needs protection from the complexities of the legal system under which he lives. The defendant may be ignorant of the rights that are granted to him by the legal system, and he therefore needs the guidance of one who is trained in the law to guard against the involuntary waiver of such rights.[21]

It is submitted that more often than not it is vital for the accused to be represented by counsel immediately upon arrest, at least to guard against the extraction of a coerced confession. Even though the law provides that a "coerced confession" is inadmissible as evidence and numerous defendants have been successful in proving coercion, this author wonders how many were unable to establish the involuntary nature of their "confession." The latter reasoning evidently prompted the dissenters in *Crooker* and *Cicenia* to declare that "the demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest."[22]

II. WHEN DOES THE RIGHT ACCRUE?

A. *Retained Counsel*

It appears that a trend is directed toward recognizing demands that the accused be represented by counsel at an early stage of the pre-trial proceedings in order to afford some protection to his rights and facilitate an adequate presentation of his defense. There are numerous reasons why this trend is developing. In addition to securing any possible procedural advantage at this early stage, an attorney can assist in explaining the charge to the accused. He can also start immediate investigation, thereby preserving valuable evidence, and perhaps most important, obtain and question witnesses at a time when the particular

21. Rackow, *The Right to Counsel—Time for Recognition Under the Due Process Clause,* 10 W. RES. L. REV. 216, 226 (1959).

22. Crooker v. California, 357 U.S. 433, 448 (1958). (Dissenting opinion.)

event is fresh in their minds. All this should be done as soon as possible if it is to be effective.[23]

> [T]he time when an accused person really needs the help of a lawyer is when he is first arrested and from then on until trial. The intervening period is so full of hazards for the accused person that he may have lost any legitimate defense, long before he is arraigned and put on trial.[24]

Most states have provided for advising the accused of his right to retain counsel at the preliminary hearing.[25] However, some states have, in the absence of statute, denied the accused the right to retain counsel at that hearing.[26]

The purpose of the preliminary hearing is to ascertain whether there is probable cause for believing the accused was the perpetrator of the crime, "so that he may not in the meantime be unlawfully deprived of his liberty."[27] The burden of proof rests on the state to show probable cause. This is established by the introduction of evidence which is subject to challenge by the accused through cross examination, impeachment of prosecution witnesses, objection to hearsay evidence, and objection to illegally obtained evidence. The necessity for an attorney to assist the accused at this hearing is obvious. What can the layman do insofar as these procedural niceties are concerned?

B. *Appointed Counsel*

Apparently, in most jurisdictions, the accused can retain counsel at his preliminary examination, if he can afford to. However, to the indigent defendant, the right to retain counsel is certainly an illusory one. Therefore, most states, either by case law or statute, provide that the arraignment is the time when appointment of counsel should be made for the indigent defendant.[28] However, because some states have no provisions or rules of this kind, the indigent's right to counsel prior to trial must stem from the due process clause.

Apparently, there is no unqualified right of appointment at the preliminary hearing. In *State v. Sullivan*[29] the Court of Appeals for the Tenth Circuit stated,

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23. Special Comm. of the New York City Bar Ass'n, EQUAL JUSTICE FOR THE ACCUSED (1959).

24. Miller, *Lawyers and the Administration of Criminal Justice,* 20 A.B.A.J. 77, 78 (1934).

25. *E.g.,* FLA. STAT. §§ 902.01-03 (1961).

26. Blanks v. State, 30 Ala. App. 519, 8 So.2d 450 (1942); Hawk v. State, 151 Neb. 717, 39 N.W.2d 561 (1949).

27. Day v. State, 185 Ark. 710, 722, 49 S.W.2d 380, 384 (1932); 22 C.J.S. *Criminal Law* § 331 (1961).

28. Beaney, *Right to Counsel Before Arraignment,* 45 MINN. L. REV. 771, 776 (1961).

29. 227 F.2d 511 (10th Cir. 1955) *cert. denied,* 350 U.S. 973 (1956).

> the right guaranteed by the constitutional amendment does not accrue until an indictment is returned or an information or other like charge is lodged against the accused. . . . The constitutional provision contains no express or implied command that an accused shall be furnished counsel at the preliminary hearing.[30]

An examination of the Supreme Court decisions indicates that the "totality of circumstances" rule set forth in *Betts*, is apparently still applicable to denial of counsel situations at the pre-trial stages. Many cases in which the Court found "special circumstances" had actually involved lack of counsel at the pre-trial stage.[31] In *Gibbs v. Burke*[32] the Court stated,

> a fair trial test necessitates an appraisal *before* and during the trial of the facts of each case to determine whether the need for counsel is so great that the deprivation of the right to counsel works a fundamental unfairness.[33]

In *United States ex rel. Reid v. Richmond*[34] the defendant, accused of murder, was assigned counsel eleven weeks before trial. Prior to the appointment of counsel, two confessions were extracted from him. The Second Circuit upheld the conviction but noted that there is a duty to appoint counsel to indigent defendants at some point prior to trial. However, "the precise point during pretrial proceedings at which the duty . . . arises is not set by any inflexible rule . . . ."[35]

Perhaps a less flexible standard was announced by the Supreme Court in *Hamilton v. Alabama*.[36] Hamilton, charged with a capital offense, was arraigned after indictment without the benefit of counsel and pleaded not guilty. He was assigned counsel prior to trial, found guilty, and sentenced to death. In Alabama, the arraignment can be extremely crucial if assertions are not timely made. The accused must enter a plea to the indictment; the defense of insanity must be raised or it is waived since it may not be raised on trial except in the Court's discretion, and a failure of the court to accept a plea of insanity is not reviewable on appeal; pleas in abatement must also be raised or they will be deemed waived; and motions to quash based on systematic exclusion of one race from the grand jury must be raised or they will be deemed waived. In view of these complex requirements at arraignment, the Court reversed the conviction, stating, "whatever may be the function

30. *Id.* at 513.

31. Moore v. Michigan, 355 U.S. 155 (1957); Palmer v. Ashe, 342 U.S. 134 (1951); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Townsend v. Burke, 334 U.S. 736 (1948).

32. 337 U.S. 773 (1949).

33. *Id.* at 781. (Emphasis added.)

34. 295 F.2d 83 (2d Cir.) *cert. denied,* 368 U.S. 948 (1961).

35. *Id.* at 88.

36. 368 U.S. 52 (1961).

and importance of arraignment in other jurisdictions, . . . in Alabama it is a critical stage in a criminal proceeding."[37]

Hamilton does not enunciate an absolute right to counsel at the arraignment. The whole rationale of the decision is that arraignment under Alabama law is an extremely critical period. Indeed, implicit in the decision is the notion that, when arraignment is not "critical," a denial of counsel will not violate due process.[38] Since this case involved a denial of counsel after indictment, it is questionable whether this "critical stage" standard will be applied to situations prior to indictment. The complex nature of arraignment in Alabama and the denial of counsel there resulted in a conclusion that the defendant was denied due process. It would appear that the rationale of *Hamilton* could at least extend to pre-indictment proceedings which in each particular instance could be termed "critical."[39]

Although the "critical stage" standard is perhaps a shade clearer and easier to apply than the "totality of circumstances" test, there is still some doubt as to its applicability in noncapital cases. Although the Court has abolished the capital-noncapital distinction at the trial stage,[40] it is apparently still questionable whether the distinction will be significant at the pre-trial stages. The Court in *Hamilton* did note the capital nature of the offense;[41] however, the crux of the decision was the intricacy of the arraignment. Certainly, the arraignment in Alabama is just as "critical" in a noncapital case as it is in a capital case.

It is submitted that Court should clearly abolish the capital-noncapital distinction at the pre-trial stage as it has finally done at the trial level. It is difficult to support logically the distinction between pre-trial capital and noncapital proceedings. Indeed, the distinction is worthless in view of the inability of laymen to understand the simplest points of law and the "simplicity of the legal issues in many capital crimes as compared with the often difficult issues of noncapital offenses."[42] Why this distinction was ever resorted to initially is not clear. In no

37. *Id.* at 54.

38. People v. Terry, 57 Cal. 2d 538, 370 P.2d 985 (1962); White v. State, 227 Md. 615, 177 A.2d 877 (1962); People v. Lupo, 16 App. Div. 2d 943, 229 N.Y.S.2d 728 (1962).

39. Apparently the Court would employ the "critical stage" test prior to indictment. *Reece v. Georgia*, 350 U.S. 85 (1955) involved a Georgia statute which required that an objection to a grand jury was to be made before the indictment was returned. The defendant contended that he had been prejudiced because Negroes had been systematically excluded from the grand jury which had indicted him on a charge of rape. Although counsel had been appointed for him on the day after his indictment, the Court held that the appointment at that time did not comply with the due process requirements.

40. Gideon v. Wainwright, 83 S. Ct. 792 (1963).

41. "When one pleads to a *capital* charge without benefit of counsel, we do not stop to determine whether prejudice resulted." 368 U.S. 52, 55 (1961). (Emphasis added.)

42. Beaney, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771, 778 (1961).

other due process question decided by the Court has this distinction appeared. Any criminal evidence seized illegally cannot be used in either capital or noncapital cases.[43] The right to trial by jury apparently is applied equally in both capital and noncapital felonies,[44] and furthermore, any unlawful methods employed by the state in obtaining a confession are equally condemned in both capital and noncapital cases.[45] The fourteenth amendment itself makes no distinction between life and liberty.[46] Substantial pre-trial rights would seem just as necessary in a prosecution which may result in loss of liberty as in one which may result in loss of life itself. Indeed, some may put a greater value upon liberty.

III. IS THE EQUAL PROTECTION CLAUSE THE ANSWER?

"The refusal to recognize the right of counsel in every criminal case has long seemed to me to be a denial of the equal protection of the law."[47]

In *Chandler v. Fretag*,[48] the right to retain counsel at trial was held to be unqualified. The petitioner was indicted for housebreaking and larceny. He was refused a continuance to enable him to obtain counsel of his own choice. In holding that the petitioner had been denied due process, the Court made it clear that the "totality of circumstances" rule did not apply to one who could afford retained counsel. Until *Gideon v. Wainwright*[49] the result of the Court's decisions was to extend an unqualified right to counsel to those who could afford it but, in effect, to deny that right to the indigent. Although this result no longer exists at the trial level, it does exist at the pre-trial stage.

As previously noted, most states allow for advising the accused of his right to retain counsel at the preliminary hearing. Assume State *X* has the following typical statute:

> A defendant shall be brought without unreasonable delay before a police justice upon arrest; the police justice must immediately inform him of the charge against him, *and of his right to the aid of counsel in every stage of the proceedings.*

Under the above statute a defendant has the unqualified right to retain counsel at any of the pre-trial proceedings, beginning at least with the preliminary hearing. However, to the indigent defendant the unqualified

43. Mapp v. Ohio, 367 U.S. 643 (1961).
44. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960).
45. Rochin v. California, 342 U.S. 165 (1952).
46. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST., amend. XIV, § 1.
47. Douglas, *The Right to Counsel—A Foreword*, 45 MINN. L. REV. 693 (1961).
48. 348 U.S. 3 (1954).
49. Gideon v. Wainwright, 83 S. Ct. 792 (1963).

right to retain counsel is a shallow right indeed. His poverty clearly places him in an inferior position to the defendant who can afford to retain counsel. This result is apparently the basis of the inquiry as to whether the indigent accused under these circumstances is denied the equal protection of the laws.[50]

Whether the equal protection clause includes a safeguard against a rich-poor distinction has not been ignored by the Court entirely. Perhaps the strongest precedents for the application of the equal protection clause to the pre-trial right to counsel situation are the "transcript cases." In *Griffen v. Illinois*,[51] the Court was confronted with an Illinois statute which gave every criminal defendant the right to take an appeal. Illinois, however, required the appellant to furnish the appellate tribunal with a transcript of the proceedings below before he could take an effective appeal. The Court concluded that an indigent defendant would not be able to bear the cost of the transcript and thereby be denied an effective appeal. Therefore, the Court held that to deny the indigent defendant an effective appeal solely on the basis that he could not bear the cost of a transcript was a denial of the equal protection of the laws. The Court stated:

> both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court. . . ." In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.[52]

This principle was affirmed by a unanimous Court in *Smith v. Bennett*[53] where it was again held that the imposition of a financial barrier to prevent the exercise of a right granted by the State violated the equal protection clause.[54]

The rationale of the "transcript cases" appears to be applicable to the rich-poor distinction existing within the right to retain counsel. The majority of states having granted an unqualified right to retain counsel are not effectively providing an "equal" right to the indigent

50. "[N]or shall any State . . . deny any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1.

51. 351 U.S. 12 (1956).

52. *Id.* at 17-18.

53. 365 U.S. 708 (1961).

54. "[T]he Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each. In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws." *Id.* at 714. See also Burns v. Ohio, 360 U.S. 252 (1959).

defendant. Indeed, one state has recognized that an equal protection violation exists in the pre-trial denial of counsel situation. In *Wyatt v. Wolf*,[55] an Oklahoma court held that counsel must be appointed for indigent defendants when they are brought before the magistrate upon arrest. In construing the Oklahoma statutes[56] the court concluded:

> the express provisions of the Constitution and the statutes and the clear implication thereof . . . is that the accused must be advised of his right to aid of counsel when brought before the magistrate. If he desires aid of counsel and is unable because of poverty to obtain counsel, it necessarily follows that the magistrate should appoint counsel for him. . . . [T]he advice in such cases, as to the right, is a vain and meaningless gesture without affecting the provisions of the right. In other words, how can we assert the right in one instance and deny it in another? . . . Equal protection of the law, where indigent defendants are involved, requires such procedure be invoked in order that the accused's substantial rights may be protected.[57]

Perhaps the strongest argument against the application of the equal protection clause to the pre-trial right to counsel question rests in Justice Frankfurter's statement in *Griffen* that "a State need not equalize economic conditions."[58] For if the equal protection clause commands a state to provide the indigent defendant with counsel when the right to retain counsel accrues, where is the line to be drawn? Would not a state also be compelled to bear the indigent's cost to employ expert witnesses; to subpoena both local and foreign witnesses; to take depositions; and perhaps even to employ counsel of competence "equal" to the best available on retainer? The latter situations are not so easily distinguishable from affording the right to counsel initially. Perhaps these sweeping connotations will motivate the Court not to apply the equal protection clause in this instance. However, the task of distinguishing *Griffen* still remains.

Perhaps there is a slight "distinction." In the "transcript cases" the inequality apparently resulted from a combination of two factors—the poverty of the accused, and the active prerequisite of a money payment imposed by and payable to the state. The element of "state action" necessary in equal protection situations is clear and outstanding. However, in the pre-trial right to counsel situation the necessary element of "state action" is not quite as noticeable. The attorney's "fee" is not imposed by the state nor is it payable to the state. This "distinction"

55. 324 P.2d 548 (Okla. Crim. App. 1958).
56. OKLA. STAT. ANN. tit. 22, §§ 251, 252 (1937).
57. Wyatt v. Wolf, 324 P.2d 548, 551 (Okla. Crim. App. 1958).
58. Griffen v. Illinois, 351 U.S. 12, 23 (1956). (Concurring opinion.)

could be the basis for the conclusion that the essential element—state action—is lacking.

It is submitted that the distinction is too slight upon which to rest the denial of counsel. The effect is the same in both the "transcript cases" and the denial of counsel cases—the defendant is denied a right available to other members of his class solely because of his poverty. It would appear that the equal protection clause at least encompasses a requirement to provide the defendant with counsel at the pre-trial stages.

CONCLUSION

It is unnecessary to reiterate all of the factors tending to show the importance of pre-trial proceedings and the ultimate effect upon the outcome of the trial. Let it suffice to state that perhaps the pre-trial stage has proven to be a greater hazard to the defense interest than the trial itself. The need for counsel at this stage is indeed great. It is rather depressing to note the perhaps hypocritical position taken by the states which refuse the assistance of counsel at the pre-trial stage. Every state imposes, in the interest of the public welfare, stringent requirements upon a person who intends to make the practice of law his profession. The state, in this instance, recognizes the complexities in the law by requiring the attorney to fulfill certain conditions before he is considered "competent" to practice within the particular jurisdiction. Yet, the accused who cannot afford to retain counsel at the pre-trial stages is in effect told that he is "competent" to practice law—at least as "competent" as the due process clause requires him to be. He is perhaps no longer one of the "general public" whose protection is assured by the requirements imposed upon the attorney.

The writer is in full accord with Professor Beaney's statement that

> this is an area where the judges must assume responsibility if substantial changes are to occur. . . . Such improvement is not likely to result from a balancing of interests, with a finding that the social and individual interest in full protection outweighs the social interest in convicting more defendants. Rather, it will result from an awareness that the present "free trial" rule as applied is illogical, and the logic of its application becomes more obvious with each case.[59]

It took twenty-one years for the Court in *Gideon* to respond to the criticism of *Betts* and provide an adequate solution to the right of counsel problem at the trial level. It is hoped the pre-trial problem will be solved within a more reasonable time.

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59. Beaney, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771, 779 (1961).