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Lester Clay Hess Jr.
West Virginia University College of Law

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Constitutional Law—The Widening Scope of State Habeas Corpus Relief

D, an indigent, pleaded guilty to a charge of grand larceny in the Circuit Court of Logan County. At no time during the proceeding did he have assistance of counsel, nor did the court in any manner inform him of his right to counsel. While confined to the penitentiary, he filed with the West Virginia Supreme Court of Appeals a petition for a writ of habeas corpus on the ground that he was denied assistance of counsel. *Held*, writ granted. The right of an accused to assistance of counsel is a fundamental right, essential to a fair trial. This safeguard, provided by the sixth amendment to the Constitution, is made obligatory upon the states under the due process clause of the fourteenth amendment. Waiver of this right must be made intelligently and understandingly. It cannot be presumed from a failure to request counsel, a record silent as to a request for counsel, or the entry of a guilty plea. *State ex. rel. May v. Boles*, 139 S.E.2d 177 (W. Va. 1964).

Prisoners and prosecutors alike have become vitally concerned with the possibility of a wider latitude of habeas corpus relief now available in the Supreme Court of Appeals of West Virginia. Although this post-conviction remedy is available on both the state and federal levels, the federal writ has been significantly wider in scope. The petitioner, under the exhaustion doctrine, must first seek relief in the state courts. In West Virginia habeas corpus traditionally has been the proper remedy when the judgment of the convicting court is void, as when the court does not have jurisdiction over the subject matter or the person. Habeas corpus relief in the federal courts, on the other hand, has been extended to cover cases in which, though the court had jurisdiction, the conviction occurred in disregard of the constitutional rights of the accused.

In 1950, the West Virginia court held that a proceeding may be reversed for either *irregularity* or *illegality*, but that only the latter defect gave authority to discharge on habeas corpus. The court pointed out that it would be irregular to sentence a person to imprisonment in his absence, where the absence was occasioned by the order of the court pronouncing the sentence. It would be illegal, the court stated, to sentence him to imprisonment for a crime punishable by pecuniary fine only. *Dye v. Skeen*, 135 W. Va. 90, 62 S.E.2d 681 (1950).

Because many state courts will grant habeas corpus only for defects in the original trial and not for claims of unconstitutional actions, the Supreme Court of the United States, in its review of state decisions, has had to determine whether the states are obliged to protect the federal rights guaranteed by the fourteenth amendment. While insisting that there is a constitutional duty on the states to provide post-conviction remedies for all due process objections, the Court has refrained from holding that a state court must entertain such post-conviction claims. Instead, it usually recommends that petitioners seek relief by way of collateral federal remedies. Note, 53 COLUM. L. REV. 1143 (1953).

In the principal case, however, the West Virginia Court expressly relied on the due process clause of the fourteenth amendment in granting the petitioner a writ of habeas corpus. In so doing, the court held that its unanimous decision was controlled by the decision in *Gideon v. Wainwright,* 372 U.S. 335 (1963). In that case the Supreme Court held that the due process clause requires that counsel be appointed to represent an indigent defendant in a state prosecution. The rationale in *Gideon*—as well as in the West Virginia case—is founded on the moving words of Mr. Justice Sutherland in *Powell v. Alabama,* 287 U.S. 45 (1932): "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." In deciding *Gideon,* the Court expressly overruled *Betts v. Brady,* 316 U.S. 455 (1942), which stood for the somewhat ambiguous rule that the right to counsel in state courts was not a "fundamental" right unless the defendant for some reason could not prepare and present his own defense. It is interesting to note that West Virginia was one of twenty-two states which filed briefs as Friends of the Court, urging the overruling of *Betts v. Brady, supra,* 65 W. VA. L. REV. 297 (1963).

The instant case, however, does not fall completely within the ambit of *Gideon.* Both defendants were indigents, but Gideon asked the court for counsel and May did not. Further, the West Virginia Constitution, unlike the Florida Constitution, provides that "In all such trials [crimes and misdemeanors], the accused . . . shall have the assistance of counsel . . . ." W. VA. CONST. art. III, § 14. In holding that the right to counsel is absolute, the Court in *Gideon* does not say that every criminal conviction is void because the accused has not been represented by counsel. To the contrary, it has been con-

sistently held that the right to counsel may be waived. A waiver of this right in West Virginia, as in federal jurisdictions, has to be made intelligently and understandingly. Prior to the *May* case, however, the general rule was that waiver of this right was presumed by failure of an accused to request counsel, by his entry of a guilty plea or by reason of a record silent on the matter of counsel. *Wade v. Skeen,* 140 W. Va. 565, 85 S.E.2d 845 (1955); *State v. Briggs,* 58 W. Va. 291, 52 S.E. 218 (1905); *State v. Kellison,* 56 W. Va. 690, 47 S.E. 166 (1904).

The petitioner in the instant case, without the assistance of counsel, entered a plea of guilty. The court records were silent on the matter of counsel. Relying on *Carnley v. Cochran,* 369 U.S. 506 (1962), the court held that the due process clause will not permit a presumption of waiver under such circumstances. The court in the principal case did not mention *Fay v. Noia,* 372 U.S. 391 (1963), where the Supreme Court decided that federal habeas corpus relief was not to be denied on grounds that a federal constitutional right had not been demanded and preserved in prior state proceedings. Under the rule in *Fay v. Noia, supra,* only a knowing and intentional waiver in the state court of a federal constitional right would bar raising this right in a federal habeas corpus proceeding. The *Fay* case pertained to constitutional rights generally, *Carnley* to right to counsel specifically.

Fay was relied on in *State ex. rel. Banach v. Boles,* 131 S.E.2d 722 (W. Va. 1963), which apparently marked the first time the West Virginia court awarded habeas corpus relief on the basis of the due process clause of the fourteenth amendment. In this case, the petitioner had been denied his constitutional right to a free transcript. Time for appeal had expired but the court, expressly relying on the *Fay* case, held that the failure to appeal did not exhaust state remedies still open to the petitioner at the time he filed his application for habeas corpus in the federal court.

The principal case establishes that the right to counsel in state criminal proceedings is a right which will not be presumed to be waived by a silent record or a guilty plea. What is to be the direct effect of the *May* case and its four companion cases in West Virginia? In a "two or three month" period immediately preceding the *May* decision, eighty-eight petitions for habeas corpus relief based on the rule in the *Gideon* case were mailed to the West Virginia Supreme Court. Charleston Gazette-Mail, Dec. 20, 1964,

p. 1D, col. 3. Whether the *May* decision will trigger an even greater number of petitions remains to be seen. Further, prosecutors attempting to convict writ holders subjected to retrial will undoubtedly find it difficult to ferret out evidence and witnesses used perhaps scores of years ago to obtain the prior conviction. The current practice appears to rely heavily on affadavits obtained from persons involved in the prior proceedings in cases where the record is silent as to the matter of counsel.

The problems raised in West Virginia by the direct effect of *May* and related cases are only overshadowed in import by the possible indirect effect of these landmark decisions. Are the *May* and *Banach* cases opening wedges which will broaden the relief available under state habeas corpus to situations other than denial of counsel and the right to a free transcript? Ultimately the question becomes whether state habeas corpus should be expanded to permit any issue which could be raised in federal habeas corpus proceedings. And, as a corollary, should it cover denial of state constitutional rights which extend beyond or are not covered by federal constitutional rights?

The Supreme Court of the United States held in 1961 that evidence obtained through illegal search and seizure is not admissible in state courts because of the due process clause of the fourteenth amendment. *Mapp v. Ohio,* 367 U.S. 643 (1961). However, the effect of *Mapp* in West Virginia remains to be determined even though the state constitution already prohibits unreasonable searches and seizures. W. VA. CONST. art. III, § 6. The West Virginia court has held that since this provision is substantially the same as pertinent provisions of the federal constitution, it should be given a construction in harmony with construction of the general provisions in the federal constitution. *State v. Bruner,* 143 W. Va. 755, 105 S.E.2d 140 (1958). Moreover, the Supreme Court of the United States has ruled that the states are bound by the federal doctrine of "reasonableness" in regard to searches and seizures. *Ker v. California,* 374 U.S. 23 (1963). Thus, if the standard of reasonableness in West Virginia fails to meet the federal standard, this gap conceivably could be a constitutional ground for habeas corpus relief. One commentator notes, however, that the *Gideon* decision creates a greater susceptibility to post-conviction collateral attack than the *Mapp* decision because in right-to-counsel cases waiver of the right will not be presumed by a silent record; while

in cases involving the exclusion of unlawfully obtained evidence, some indication of an unreasonable search and seizure must be present in the record. Note, 18 Sw. L. J. 284, 290 (1964).

Although state habeas corpus may someday be applied on the basis of the exclusionary rule as set out in *Mapp,* perhaps a more likely avenue of approach for prisoners seeking state habeas corpus relief lies in the federal constitutional requirements regarding confessions. In *Jackson v. Denno,* 378 U.S. 368 (1964), the Supreme Court held that state hearings on the voluntariness of a confession may be conducted by the trial judge, another judge, or an independently convened jury, but not by the trial jury. The Court stated that permitting a jury to determine both voluntariness and guilt is unfair and unreliable, thus depriving the accused of his rights without due process of law.

The practice in West Virginia, when an objection to a confession is interposed, is to hold a preliminary hearing out of the presence of the jury at which the trial judge fully determines the coercion issue. This procedure was attacked by the United States Supreme Court in *Boles v. Stevenson,* 85 Sup. Ct. 174 (1964). The Court held that such procedure was a denial of due process in that it was not fully adequate to insure a reliable determination of the voluntariness of the confession, since the record failed to show if the trial judge decided whether the confession was involuntary, or, if voluntary, what standards he used. The prisoner was to be afforded either a hearing on the voluntariness or a new trial; in the event of neither, he should be released. Whether the *May* rule will be extended to cover these federal constitutional safeguards in a state habeas corpus proceeding remains to be seen, even though they stem from the familiar due process clause.

The voluntariness standard now appears to be so sensitive that police refusal of any reasonable request constitutes coercion. In *Escobedo v. Illinois,* 84 Sup. Ct. 1758 (1964), the defendant, during a police investigation before he was formally indicted, was denied a request to consult with his attorney. Mr. Justice Goldberg, expressing the view of five members of the Court, stated that the investigation had focused on the accused as a suspect and had lost the quality of a general investigation. Hence, the refusal to honor the accused's request constituted a denial of his right to the assistance of counsel under the sixth and fourteenth amendments.

Mr. Justice Stewart dissented on the grounds that the right to assistance of counsel should not attach until the formal institution of proceedings by indictment, information or arraignment. He reasoned that the majority's holding could have an unfortunate impact on the fair administration of criminal justice. It may be argued that if the requirement to provide counsel is extended to the moment of detention, extra-judicial confessions might categorically be held inadmissible. Note, 63 MICH. L. REV. 381 (1964).

The West Virginia court has awarded habeas corpus relief on the basis of two federal constitutional grounds—the right to counsel and the right to a free transcript. This provided a significant broadening of the rather limited reach of the traditional state habeas corpus remedy. There appears to be nothing to prevent the court from awarding state habeas corpus relief on the basis of a violation of constitutional rights laid out in the *Jackson*, *Stevenson* and *Escobedo* cases. If *May* and *Banach* actually represent a crack in the door, as they appear to, state habeas corpus relief conceivably could be opened to all constitutional objections which may now be advanced in federal courts.

Lester Clay Hess, Jr.

Criminal Law—Confessions Before Arraignment

Petitioner, a state prisoner, sought habeas corpus relief in the federal court. Petitioner claimed that his state court conviction violated his constitutional rights because it was based on an inadmissible confession. The confession was obtained after he had been arrested without a warrant and questioned about a fire which had resulted in a death. No formal charges were lodged against petitioner until after the confession had been signed. The writ of habeas corpus was denied and petitioner appealed. *Held*, affirmed. The use of a confession freely given does not deny due process, even though the confession was obtained during a period of unlawful detention. The test is whether the confession was voluntary or coerced. *Allen v. Bannan*, 332 F.2d 399 (6th Cir. 1964).

State concern with admissibility of evidence obtained between arrest and arraignment has become more intense since the establishment of the *McNabb-Mallory* rule in the federal courts. This rule excludes from federal prosecutions all incriminating statements