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Constitutional Law - Right to Counsel

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ment of two people (Miss Mapp and Mr. Linkletter) in identical situations should be merely a function of the efficiency of a state's judicial system, as Mr. Justice Black's dissent points out.[16] As well-founded as all of these arguments are, however, it must be borne in mind that the problem confronting the Court was a serious one, and the pragmatic considerations concerning the administrative side of the judicial system alone go far toward meeting the critics' arguments. Also, although one may say that this decision breaks precedent, it must be remembered that in this area of the law there is ample historical background stretching over hundreds of years for doing so.[17] Finally, a decision in a case like this is composed of a large amount of value judgment, which makes it amenable to the barbs of criticism. This particular decision, though, is favored with a thorough logical and historical style and composition that, upon reflection, make it much easier for the reader to fully understand the thought-process of Mr. Justice Clark and the full import of what he is trying to convey. Perhaps the greatest flaw in the decision, and thus the starting-point for most of the criticism, is that its pragmatic aspect has the very unpragmatic effect of keeping the jails full while attempting to keep the courts empty. While this is deplorable in many respects, one cannot quarrel with the Court's desire to be of assistance to an already overworked judiciary, nor can one fail to realize that in this area of constitutional development the Supreme Court is experiencing somewhat rapid and far-reaching changes, the material effect of which must also be dealt with. While the decision may appear to fly in the face of "what is right," the nature and importance of the question and the scrupulously correct means used to decide it are such as to blunt the arguments of its opponents upon a fair legal appraisal of all that is involved.

Samuel J. Pasquarelli

CONSTITUTIONAL LAW—Right to Counsel—The United States Supreme Court, in making an accused's right to confront witnesses a fundamental right applicable to the states, unnecessarily extended constitutional law.

Pointer v. Texas, 380 U. S. 400 (1965).

In April of this year, the Supreme Court of the United States in *Pointer v. Texas*[1] rendered a decision which resulted in the application of another constitutional provision to the states. Now, the right of an accused to confront witnesses against him can be enforced in any state court as well as in the federal courts.

16. Linkletter v. Walker, *supra* note 2, at 1744.

17. 1 BLACKSTONE, COMMENTARIES 69 (15th ed. 1809).

1. 380 U.S. 400 (1965).

The petitioner and one Dillard were arrested in Texas on a charge of having robbed one Phillips "by assault or violence, or by putting in fear of bodily injury."[2] At the preliminary hearing, the principal witness for the State was the victim, Phillips. Neither of the defendants had counsel at this hearing. Both, however, had the right to cross-examine any witnesses brought in by the State. The petitioner did not try to cross-examine Phillips, and was subsequently indicted on the charge. Before the trial began, Phillips moved out of the state with no intention of returning. Since Phillips was not present at the trial, the State offered the transcript of his testimony given at the preliminary hearing as evidence against the petitioner. The evidence was admitted and bore heavily in petitioner's conviction. The conviction was affirmed on appeal to the Texas Court of Criminal Appeals.[3] The United States Supreme Court granted certiorari.

Without deciding the question raised by petitioner, *i.e.* denial of counsel,[4] the Supreme Court held that the use of the transcript of a witness' testimony at a preliminary hearing in which petitioner was not represented by counsel was a denial of his sixth amendment right to confront and to cross-examine through counsel the witnesses against him. In reversing the conviction, the Court applied this right to the states, holding:

> . . . that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.[5]

Without considering the validity of the Court's view concerning the right of confrontation or the present trend in their decision-making, it is easily discernable that there existed a more rational approach to this case, one which would not have violated the Court's long-settled policy of refraining from deciding constitutional questions unless absolutely necessary.[6] This case could have been decided on the grounds that the State of Texas had denied the petitioner his right to counsel as guaranteed him by the sixth and fourteenth amendments.[7] The Court paid very little attention to this aspect of the case, claiming that the time when the petitioner was without counsel was not a "critical stage" in the case. The Court reasoned that since under Texas criminal procedure the preliminary hearing served only to decide whether or not the accused should be held for the grand jury and, if so, whether he should be admitted to bail, this

2. TEXAS PENAL CODE art. 1408.

3. 375 S.W.2d 293 (Tex. Crim. App., 1965).

4. Gideon v. Wainwright, 372 U.S. 335 (1963).

5. Pointer v. Texas, *supra* note 1, at 403.

6. Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Poe v. Ullman, 367 U.S. 497 (1961).

7. Gideon v. Wainwright, *supra* note 4; Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

proceeding was not of such urgency as to warrant the presence of counsel.[8] The Court further stated that only when the stage in a criminal case becomes critical, as when a proceeding calls for or accepts a plea of guilty or not guilty, then the failure to appoint counsel to represent the accused would be denial of his right to counsel.[9] This view is utterly inconsistent with the Court's decision in *Escobedo v. Illinois*,[10] where the Court held that:

> where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel. . . ."[11]

If the Court in *Escobedo* felt that when the police have a suspect the time is critical enough for the right to counsel to attach, why is an official criminal proceeding of a state court not likewise critical? In the Texas preliminary hearing, the petitioner was accused by a witness and by the State of being the perpetrator of a crime. Surely, the investigation into the crime had ceased to be "investigatory" and had become "accusatory." Then, since the petitioner was without counsel at this time, there was a violation of his right to have the "assistance of counsel."

The one disadvantage of the argument raised here is that *Escobedo*, as cited above, calls for a request by the defendant for counsel. From the Record in *Pointer*, there was no request by the petitioner. Since not all laymen know of their constitutional rights, would it not have been a more rational approach to settling this case, and a more logical extension of constitutional law to eliminate the need for a "request for counsel" than for the Court to have unnecessarily imposed another constitutional provision upon the states?

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8. Pointer v. Texas, *supra* note 1.
9. White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).
10. Escobedo v. Illinois, *supra* note 7.
11. *Id.* at 490, 491.