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Criminal Procedure - Right to Counsel at Preliminary Hearing

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CRIMINAL PROCEDURE—RIGHT TO COUNSEL AT PRELIMINARY HEARING—The United States Supreme Court has held that, if a defendant is given a preliminary hearing, it is a "critical stage" in a state's criminal prosecution in which the defendant is entitled to the aid of counsel and the appointment of counsel if necessary.

Coleman v. Alabama, 399 U.S. 1 (1970).

Petitioners were convicted in an Alabama Circuit Court of assault with intent to murder. They were given a preliminary hearing which was not a required step in an Alabama criminal prosecution.[1] They were not represented by counsel. Nothing occurring at the preliminary hearing was used at the trial.[2] Petitioners argued that the preliminary hearing was a "critical stage" of the prosecution and that the state unconstitutionally denied them the assistance of counsel by failing to provide them with appointed attorneys at the hearing.[3] The United States Supreme Court granted certiorari[4] after the Alabama Court of Appeals affirmed the conviction[5] and the Alabama Supreme Court denied review.[6]

In *Powell v. Alabama*[7] the Court held that a person accused of a

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contract period has run—NLRB v. Warrensburg Board & Paper Corp., 340 F.2d 920 (2nd Cir. 1965).

b. a party may not seek to vitiate his voluntary agreement to participate in multi-employer bargaining by engaging in an untimely withdrawal from such a unit—Universal Insulation Corp. v. NLRB, 361 F.2d 406 (6th Cir. 1966).

c. an employer may not avoid his obligation to seek a good faith agreement with the statutory representative of his employees as to the terms and conditions of employment by unilaterally altering such terms and conditions—Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

d. an employer may not dissipate the good faith collective bargaining requirement by engaging in individual bargaining—National Licorice Co. v. NLRB, 309 U.S. 350 (1940).

e. an employee may not bargain with a union which has not been freely chosen by his employees as their representative—Virginia Electric & Power Co. v. NLRB, 319 U.S. 533 (1943).

f. an employer may not refuse to sign a contract where all of the terms of the contract have been settled except one which involves a nonmandatory bargaining subject—NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958).

1. Coleman v. Alabama, 399 U.S. 1 (1970), *Citing Ex parte* Campbell 278 Ala. 114, 176 So. 2d 242 (1965).

2. Pointer v. State of Texas, 380 U.S. 400 (1965). *Pointer* bars the admission of testimony given at a preliminary hearing where the defendant did not have the benefit of the aid of counsel. This rule was "scrupulously observed" in Coleman v. State, 44 Ala. 429, 433, 211 So. 2d 917, 921 (1968).

3. "In all criminal prosecutions, the accused shall . . . have the assistance of counsel." U.S. CONST. amend. VI.

4. 394 U.S. 916 (1969).

5. 44 Ala. App. 429, 211 So. 2d 917 (1968).

6. 282 Ala. 725, 211 So. 2d 927 (1968).

7. 287 U.S. 45 (1932).

crime "requires the guiding hand of counsel at every step in the proceedings against him."[8] The instant case points out that this constitutional principle has been extended beyond the presence of counsel at trial.[9] In order to extend this principle the Court has applied the test, annunciated in *United States v. Wade*,[10] to determine whether the proceeding is a "critical stage."[11] If it is a "critical stage" the defendant is entitled to the aid of counsel and the appointment of counsel if necessary.[12] The question asked is "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid the prejudice."[13]

In applying the test, in the instant case, the Court concluded that the preliminary hearing was a "critical stage" since the lawyer's assistance was essential to protect the accused's basic right to a fair trial.[14] The preliminary hearing would afford the lawyer an opportunity to gather information in order to impeach the state's witnesses; preserve testimony of witnesses favorable to the accused who may not appear at the trial; discover the state's case and therfore be able to prepare a proper defense; and, to make such arguments as the necessity for a psychiatric examination or bail.[15] The lawyer might further be able to expose weaknesses in the state's case, possibly causing the magistrate to refuse to bind the accused over.[16]

The Court also stated that the preliminary hearing was a "critical stage" even if the lower court prohibited the state's use at the trial of

8. *Id.* at 69.

9. 399 U.S. at 7. The court cited the following cases: United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967), right to counsel at a pretrial lineup; Hamilton v. Alabama, 368 U.S. 52 (1961), right to counsel at a pretrial type of arraignment; *See* White v. Maryland, 373 U.S. 59 (1963); *cf.* Miranda v. Arizona, 384 U.S. 436 (1966), right to counsel at a pretrial custodial interrogation. *See also* Massiah v. United States, 377 U.S. 201 (1964).

10. 388 U.S. 218, 227 (1967).

11. It is suggested that the origin of the phrase "critical stage" may be found in Powell v. Alabama, 287 U.S. at 59, where the Court stated:

> . . . the circumstance lends emphasis to the conclusion that during perhaps the most *critical period* (emphasis added) of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important the defendants did not have the aid of counsel . . . although they were as much entitled to such aid during that period as at the trial itself.

12. See note 9.

13. 388 U.S. at 227.

14. 399 U.S. at 9. Mr. Justice Black in his concurring opinion objected to the right to a "fair trial as conceived by judges." He said:

> . . . our Constitution and Bill of Rights did not . . . use any such vague, indefinite, and elastic language . . . I still prefer to trust the liberty of the citizen to the plain language of the Constitution rather than to the sense of fairness of particular judges.

Id. at 12-13.

15. *Id* at 9.

16. *Id.*

anything that occurred at the preliminary hearing, where the defendant did not have a lawyer.[17]

The right to have a preliminary hearing is not a constitutional right,[18] but is granted only when required by statute,[19] and is therefore subject to limitations in the statute.[20] A preliminary hearing is not a trial but merely a course of procedure.[21] Its purposes are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury and if so to set bail if the offense is bailable.[22]

Prior to *Coleman*, assuming that the jurisdiction had a statute providing for a preliminary hearing,[23] the accused had neither a right to counsel[24] nor was he entitled to have counsel appointed unless it was required by statute.[25] However, the rule in most of the jurisdictions was that the accused was entitled to the aid of counsel at his preliminary hearing if it was a "critical stage" of that jurisdiction's crim-

17. *Id.* See note 2.

18. There is no federally protected right to a preliminary hearing when the crime is against the United States. United States *ex rel.* Hughes v. Gault, 271 U.S. 142 (1925). There is no federal requirement that a state set up a procedure for preliminary hearings. United States *ex rel.* Combs v. Denno, 231 F. Supp. 942 (1964). It has been suggested that perhaps there may soon be a due process right to a preliminary hearing. Comment, 51 IOWA L. REV. 164, 182 (1965-66).

19. 22 C.J.S. *Criminal Law* § 332 (1961). This source states that the preliminary hearing was unknown to the common law and, therefore, in absence of statute no preliminary hearing is necessary. Some writers state, however, that the preliminary hearing was recognized by the common law. Comment, 39 U. COLO. L. REV. 580 (1966-67); Comment, 51 IOWA L. REV. 164, 165 (1965-66).

20. The right to a preliminary hearing may depend upon the crime charged. See State v. Bennett, 74 Ariz. 6, 242 P.2d 840 (1952), where a preliminary hearing was not granted because the crime charged was a misdemeanor and not a felony.

21. Carrol v. Turner, 262 F. Supp. 486 (1966). Mr. Chief Justice Burger based his dissent, in the noted case, on this point. He argued that anyone subjected to a preliminary hearing should be provided with counsel not because the Constitution commands it but rather by statute or the rulemaking process. 399 U.S. at 21. He said, "the only relevant determination is whether a preliminary hearing is a 'criminal prosecution' not whether it is a 'critical event' in the progress of a criminal case." *Id.* at 23.

22. 44 Ala. App. at 433, 211 So. 2d at 920. *See* CODE OF ALABAMA, tit. 15, §§ 139, 140, 151 (1940). Although these are the purposes established by the Alabama legislature they are similar to what may be found in most jurisdictions. A third purpose found in some jurisdictions is to preserve evidence. *See* People v. White, 18 Misc. 2d 56, 188 N.Y.S. 2d 585 (1959).

23. It has been reported that only Delaware, Maryland and Vermont have no provision whatever for a preliminary hearing. Comment, 39 U. COLO. L. REV. 580 (1966-67). The noted case could add impetus to recent arguments for the necessity of preliminary hearings. *See generally* Comment, 51 IOWA L. REV. 164 (1965-66); Comment, 39 U. COLO. L. REV. 580 (1966-67); Comment, 116 U. PA. L. REV. 1416 (1967-68). But as Mr. Justice White points out in his concurring opinion, ". . . requiring the appointment of counsel may result in fewer preliminary hearings in jurisdictions where the prosecution is free to avoid them by taking a case directly to a grand jury. Our ruling may also invite eliminating the preliminary hearing system entirely." 399 U.S. at 17.

24. Fry v. Hudspeth, 165 Kan. 674, 197 P.2d 945 (1948).

25. *Id.*

inal procedure.[26] A preliminary hearing not a "critical stage" could become critical if the trial was likely to be prejudiced as a result of what happened at the preliminary hearing.[27]

Coleman, in removing any question as to whether a preliminary hearing is a "critical stage," seems to be a reasonable development from the Court's decisions in which the right to aid of counsel has been required.[28] How critical a stage can be said to be is questionable where the Court in a subsequent decision refuses to apply the holding retroactively.

In *Wade* the pretrial lineup was held to be a "critical stage" because of the "innumerable dangers and variable factors which might seriously and even crucially . . . derogate from a fair trial."[29] However, the Court's analysis was inconsistent because as critical as the Court said the pretrial lineup was, it was not so critical as to compel the Court to apply the ruling retroactively in *Stovall v. Denno.*[30] This inconsistency is an argument that can be added to those arguments[31] that have already attacked the Court's technique of prospectively applying constitutional rules of criminal procedure.[32]

Mr. Justice Black, dissenting in *Stovall,* argued that the majority opinion, by keeping people in jail who were convicted on the basis of unconstitutional evidence, was not only depriving them of a constitutional trial but also subjecting them to a "rank discrimination."[33]

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26. Pearce v. Cox, 354 F.2d 884 (1965).

27. *See* White v. Maryland, 373 U.S. 59 (1963). The preliminary hearing was held to be a "critical stage" where petitioner entered a plea of guilty without the aid of counsel. The Court quoting from *Hamilton v. Alabama,* 368 U.S. 52, 55 (1961), said: "Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."

28. See note 9.

29. 388 U.S. at 288.

30. 388 U.S. 293 (1967). This case was decided on the same day as *Wade* and *Gilbert.* It did not involve a pretrial lineup; rather, the defendant was taken to a hospital to be identified by the victim. It should be noted that the defendants in *Wade* and *Gilbert* benefited from the decision only to avoid the consequences of this constitutional rule of criminal procedure standing as mere dictum. *Id.* at 301.

31. Among the articles are Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin,* 33 U. CHI. L. REV. 719 (1965-66); Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 VA. L. REV. 201 (1965).

32. *Stovall* is the extent to which the *Linkletter v. Walker,* 381 U.S. 618 (1965), test for determining when to apply a constitutional rule of criminal procedure retroactively can be taken. *Linkletter* denied retroactive application of Mapp v. Ohio, 367 U.S. 643 (1961), to cases not yet final. The application and development of the test up to *Stovall* can be traced through the following cases: Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966), applying Griffin v. California, 380 U.S. 609 (1965), to cases not yet final; Johnson v. State of New Jersey, 384 U.S. 719 (1966) applying Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964), to cases in which the trial had begun on or after the date the rules were announced.

33. 388 U.S. at 304.

He stated that the Court, having interpreted the Constitution, could not *legislate* when the provisions would take effect by "weighing 'countervailing interests.' "[34]

Subsequent to *Stovall,* the Court in *Desist v. United States*[35] again refused to apply a constitutional rule of criminal procedure retroactively. Although the case did not involve the application of the "critical stage" analysis, Mr. Justice Harlan's dissent is relevant in that it attacked prospective overruling for the unequal treatment[36] inherent in the device.[37] He argued that the Court "departs from basic judicial tradition"[38] when it randomly selects, among many similarly situated defendants, which ones will benefit from the Court's decision.[39] Harlan concluded that "retroactivity" must be rethought because the Court is presently in the midst of "doctrinal confusion."[40]

Since the Court in *Coleman,* made no mention as to whether the rule was to be applied retroactively,[41] it is reasonable to assume that there will be a subsequent case raising this question. It is hoped that the Court at that time will choose to reevaluate its views on the retroactive application of constitutional rules of criminal procedure.

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34. *Id. See also* 381 U.S. at 640, (Mr. Justice Black's dissent in *Linkletter*). By "countervailing interests," Mr. Justice Black is referring to the *Linkletter* test as applied in *Stovall.*

35. 394 U.S. 244 (1969). Katz v. United States, 389 U.S. 347 (1967), denied retroactive effect.

36. Mr. Justice Douglas in his dissent in *Desist* argued that this technique was not "the administration of justice with an equal hand." 394 U.S. at 255. He pointed out that in *Miranda* eighty cases raised the same question but only four benefited from the rule.

37. *See,* Fairchild, *Limitation of New Judge Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting,"* 51 MARQ. L. REV. 254, 267 (1965).

38. The tradition is that of releasing a criminal "because the government has offended a constitutional principle in the conduct of his case." 384 U.S. at 258.

39. *Id.*

40. *Id.*

41. The assumption that a decision determining the meaning of the Constitution must be applied retroactively is no longer controlling as to constitutional rules of criminal procedure in light of *Linkletter* and the cases that followed. See note 32.