

August 15, 1962

Honorable Richard W. Ervin
Attorney General
State of Florida
Tallahassee, Florida

Dear General:

I have been carefully studying your recent letter "inviting the Attorneys General of all states to submit amicus briefs" on your behalf in the pending case of Gideon v. Cochran. You maintain in that case that people too poor to hire lawyers need not have any provided them by the state, but must defend themselves against serious felony charges alone, as best (or as badly) they can.

I cannot accept your invitation.

You oppose the requirement that counsel be appointed for all indigent felony defendants because such a requirement "would infringe on the right of the states to determine their own rules of criminal procedure." I believe in federalism and states' rights too. But I also believe in the Bill of Rights. I believe deeply that, as Justice William Brennan put it, "federalism should not be raised to the plane of an absolute, nor the Bill of Rights be reduced to a precatory trust." Brennan, The Bill of Rights and the States, 36 N.Y.U.L. Rev. 761, 774 (1961). I also share the view of Justice Walter Schaefer of the Illinois Supreme Court, Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956), that:

"Considerations of federalism of course remain important. But in the world today they must be measured against the competing demands arising out of the relation of the United States to the rest of the world. The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law. That measurement is not taken merely in retrospect by social historians of the future. It is taken from day to day by the peoples of the world, and to them the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States."

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Nobody knows better than an attorney general or a prosecuting attorney that in this day and age furnishing an attorney to those felony defendants who can't afford to hire one is "fair and feasible." Nobody knows better than we do that rules of criminal law and procedure which baffle trained professionals can only overwhelm the uninitiated.

The Minnesota legislature has long been concerned with the rights of indigent defendants in felony cases. As early as 1869 the legislature passed a statute providing for the appointment of counsel for those unable to afford their own counsel.

As chief law enforcement officer of one of the 35 states which provide for the appointment of counsel for indigents in all felony cases, I am convinced that it is cheap -- very cheap -- at the price. I can assure you that such a requirement does not disrupt or otherwise adversely affect our work.

The only surprising feature about requiring the state to provide counsel for the indigent defendant in all felony cases is that it comes so late. Away back in 1825 William Rawle, a former federal prosecutor himself, incidentally, observed that "the most innocent man, pressed by the awful solemnities of a public accusation and trial, may be incapable of supporting his own cause. He may be utterly unfit to cross-examine the witnesses against him, to point out the defects of their testimony, and to counteract it by properly introducing and applying his own. Hence the importance, we might say, the right, of having the aid of men educated and accustomed to manage criminal trials, to whose knowledge and skill he may safely commit the conduct of his defence." Rawle, A View of the Constitution of the United States of America, 127-28.

Of course, we have made some progress since Rawle's day. In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court imposed a "flat requirement" of appointment of counsel in all state cases in which the death penalty may be imposed. But this only serves to make the refusal of the court -- until now -- to impose a similar requirement in all state felony cases still less defensible. As Professor Francis Allen of the University of Chicago Law School has pointed out, Allen, The Supreme Court, Federalism, and Criminal Justice, 8 DePaul L. Rev. 211, 230 (1959):

"If the rights of counsel are deemed an inherent part of the concept of 'fair hearing,' as has been consistently asserted by the Court since the Powell case, the crucial inquiry would seem to be, not so

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much the penalties imposed on the defendant upon conviction, but the need for skilled representation in the proceedings directed to the establishment of guilt. There is little basis for the belief that trials of capital cases, in general, produce greater need than trials of several other categories of serious, non-capital felonies. Most experienced defense lawyers would probably testify that a murder prosecution, which may result in imposition of the death penalty, is not by any means ordinarily the case most difficult to defend. Indictments charging the accused with such crimes as embezzlement, confidence game, or conspiracy, are likely to place the unrepresented defendant in a far more helpless position. The rule, therefore, seems vulnerable to fundamental criticism ***."

It may come as a surprise to some that a law enforcement officer is concerned about the rights of defendants. But one of our basic duties is to see that the defendant has a fair trial. As Brooklyn District Attorney Edward S. Silver noted with justified pride -- at a time when he was President of the National Association of District Attorneys -- he and other New York district attorneys have introduced a number of bills aimed at protecting the rights of defendants. Silver, The Wiretapping - Eavesdropping Problem: A Prosecutor's View, 44 Minn. L. Rev. 835, 851-52 (1960). I think Mr. Silver spoke for all attorneys general and prosecutors who meet their responsibilities when he said: "Justice, and only justice, must be our goal and a desire for results that will insure statistical excellence may frequently interfere with the attainment of this end." Id. at 852 n. 60. Since I firmly believe that any person charged with a felony should be accorded a right to be represented by counsel regardless of his financial condition, I would welcome the courts' imposition of a requirement of appointment of counsel in all state felony prosecutions.

Sincerely yours

WALTER F. MONDALE
Attorney General

WFM: jc



STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

RICHARD W. ERVIN
ATTORNEY GENERAL

August 21, 1962

Thye Crown
Please Answer
for me
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Honorable Walter F. Mondale
Attorney General
State of Minnesota
St. Paul, Minnesota

Re: Right to counsel; Gideon v. Cochran

Dear General Mondale:

Thank you for your recent letter pertaining to the above case. I am compelled to answer because I feel that you do not fully understand my position in the matter.

Gideon petitioned the Florida Supreme Court for a writ of habeas corpus, alleging that an attorney should have been appointed for him, even though he was charged with a non-capital felony. Since, under Florida statutory law, there is no absolute duty imposed upon a trial court to supply an indigent defendant with counsel in a non-capital case, the Florida Supreme Court denied the petition without a hearing or a return. It is from that denial that the United States Supreme Court granted certiorari.

I have thus been placed in the position of an advocate, and as I see it, my duty is to present to the Supreme Court the strongest possible argument on why the doctrine of Betts v. Brady should be adhered to. My personal feelings on whether Betts is a good rule or not are of no consequence, due to my status as an advocate.

Due to the far-reaching implications of the Gideon case in the fields of constitutional and criminal law, I invited the Attorneys General of all the states to submit amicus curiae briefs. I sent such requests to those states which have laws mandatorily requiring appointment of counsel in felony cases for two reasons: (1) Attorneys General of some of those states might strongly believe that the states themselves should be entitled to set up their own rules of criminal procedure, and that the states themselves should be allowed to decide when to require automatic appointment of

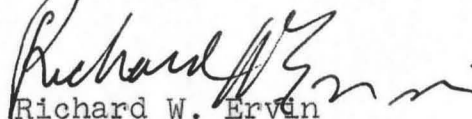
Honorable Walter F. Mondale
August 21, 1962
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counsel in felony prosecutions, and (2) If the Supreme Court overrules Betts v. Brady, there is at least a small possibility that the Sixth Amendment's right to counsel provision will be specifically incorporated in the Fourteenth Amendment. If this happens, it seems to me that states may be required to appoint counsel in misdemeanor cases as well as in felonies. Since many states do not provide counsel in misdemeanor cases, they may be interested in filing amicus briefs on this point.

I hope these remarks will clarify my position in the Gideon case.

With best wishes, I am

Sincerely,


Richard W. Ervin
Attorney General

RWE/bjvh

September 10, 1962

The Honorable Richard W. Ervin
Attorney General
State Capitol
Tallahassee, Florida

Dear General Ervin:

Thank you very much for your recent letter explaining more fully your position in the case of Gideon v. Cochran. I understand fully your responsibility under Florida law to defend the Florida criminal procedures when legally attacked. I truly understand and respect your position as an advocate. However, my strong belief in the doctrine that every person, regardless of financial resources, should have a right to counsel, requires me to continue to advocate the position which was outlined in my previous letter.

Sincerely yours,

WALTER F. MONDALE
Attorney General

WFM:dck



THOMAS F. EAGLETON
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

October 24, 1962

Honorable Walter F. Mondale
Attorney General
State of Minnesota
St. Paul, Minnesota

Dear Walter:

I will be happy to join with you in an amici curiae brief in the United States Supreme Court in the case of Gideon v. Cochran.

It is my understanding that this case squarely challenges the doctrine of Betts v. Brady, 316 US 455, 62 S. Ct. 1252, 86 L. Ed. 1595, and I believe that those states which have taken it upon themselves to guarantee the right of counsel to indigent defendants should be heard on this issue.

Since 1825, Missouri has provided by statute for the appointment of counsel in felony cases to represent defendants unable to employ counsel, upon the request of the defendant. More recently, this right has been extended by Missouri Supreme Court Rule 29.01 to provide that, upon arraignment on a felony charge, if it shall appear to the court that the defendant is unable to employ counsel the court has the affirmative duty of informing the defendant of his right to counsel. The court must then make specific inquiry to determine whether defendant desires to have counsel appointed, and if so desired, make the appointment.

I have long felt that the distinction drawn by the United States Supreme Court between capital and noncapital cases in determining the right to appointed counsel is an artificial one. The Fourteenth Amendment guarantees due process of law, whether it be life, liberty or property of which a person is to be deprived. Moreover, the rash of cases in recent years in which the Supreme Court has found due process to be violated for failure to appoint counsel in noncapital cases evidences the failure of the Court's piecemeal approach. Undoubtedly, for every case reversed, dozens never reach the high court, probably, ironically enough, for want of counsel to pursue the appellate or habeas corpus routes.

Honorable Walter F. Mondale

The injustice of the present Florida procedure is aptly demonstrated by the opinions in *Carney v. Cochran*, 369 US 506, 82 S. Ct. 884, 8 L. Ed. 2d 70, particularly that of Mr. Justice Douglas, concurring. To my mind, the only effective remedy lies in a declaration by the Supreme Court that due process of law requires that counsel be made available for every defendant charged with a felony. I certainly hope that the amici brief which you propose will assist the court to that conclusion, and I am pleased to add the name of the State of Missouri to it.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

P.S.

If it is your desire to include in your brief any "local law" on this question insofar as the states which are joining you in the amicus brief, we would be only too happy to furnish you with a memorandum of Missouri law on the right of an accused to be supplied counsel.



The Commonwealth of Massachusetts
Department of the Attorney General

State House, Boston 33

Edward J. McCormack, Jr.
Attorney General

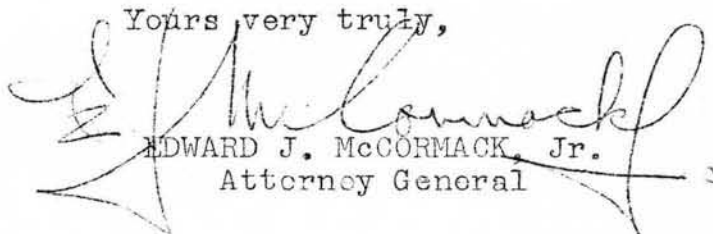
November 26, 1962

Dear General:

I am pleased to enclose a copy of the Brief
For Amici Curiae which was filed with the United States
Supreme Court in the matter of Gideon v. Cochran.

With all best wishes,

Yours very truly,


EDWARD J. McCORMACK, Jr.
Attorney General

B:K

Enc.



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