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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 837.

SMITH BETTS,

Petitioner,

vs.

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND.

ON WRIT OF CERTIORARI TO THE HONORABLE CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE.

BRIEF OF PETITIONER.

I.

OPINION OF THE COURT BELOW

The opinion of Judge Carroll T. Bond is not officially reported. It appears in the Record at page 26.

II.

JURISDICTION.

These proceedings were originally instituted by the filing of a petition for a writ of *habeas corpus* before the Honorable Carroll T. Bond, Judge, on August 29, 1941. Judge Bond had jurisdiction in the case, and properly granted the writ for a consideration on its merits.

On October 6, 1941, Judge Bond remanded the petitioner to the custody of the respondent, and to review his decision, a petition for a writ of certiorari was filed in this court on January 3, 1942. Certiorari was granted on February 16, 1942.

The jurisdiction to review the decision of Judge Bond on writ of certiorari is conferred upon this court by Section 237(b) of the Judicial Code as amended by the Act of Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 937, U. S. C. Tit. 28, sec. 344(b). It is contended by the petitioner that the judgment is reviewable in that it decided adversely to the petitioner a substantial federal question involving his rights under the Fourteenth Amendment to the Constitution of the United States, which question was properly presented by the record.

III.

STATUTORY PROVISIONS INVOLVED.

The power to hear and decide the case was conferred on Judge Bond by Article 4, Sec. 6 of the Constitution of the State of Maryland, reading as follows:

> "All Judges shall by virtue of their offices be Conservators of the Peace throughout the State; and no fees, or perquisites, commission or reward of any kind, shall be allowed to any Judge in this State, besides his annual salary, for the discharge of any Judicial duty."

Article 42 of the PUBLIC GENERAL LAWS OF MARYLAND (Flack's 1939 Ed.) prescribes the practice and procedure in *habeas corpus* cases in Maryland. The pertinent sections of that Article read as follows:

"1. The court of appeals and the chief judge thereof shall have the power to grant the writ of *habeas corpus,* and to exercise jurisdiction in all matters relating thereto throughout the whole State. The circuit courts for the respective counties of this State, and the several judges thereof out of court, the superior court of Baltimore City, the court of common pleas of said city, the circuit court and circuit court No. 2 of Baltimore City, and the Baltimore City court, and the judges of said several courts, out of court, and the judge of the court of appeals from the city of Baltimore, shall have the power to grant the writ of *habeas corpus,* and to exercise jurisdiction in all matters pertaining thereto.

"2. The writ of *habeas corpus* may and shall be granted by any of said courts, or by any of the judges mentioned in the preceding section, whether in term or vacation, upon application being made as herein directed."

"3. [As amended by Laws of Maryland, 1941, c. 484] Any person committed, detained, confined or restrained from his lawful liberty within this State for any alleged offense or under any color or pretense whatsoever, or any person in his or her behalf, may complain to the Court or judge having jurisdiction and power to grant the writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement or restraint may be inquired into; and the said respective courts or judges to whom such complaint is so made shall, unless it appears from the complaint itself or the documents annexed that the petitioner would not be entitled to any relief, forthwith grant the writ of habeas corpus, directed to the officer or other person in whose custody or keeping the party so de-

tained shall be, returnable immediately before the said court or judge granting the same.

"4. The writ of *habeas corpus* shall be served by delivering to the officer or other person to whom it is directed, or by leaving it at the prison or place in which the party suing it out is detained; and such officer or other person shall forthwith or within such reasonable time (not exceeding three days after such service), as the court or judge shall direct, make return of the writ, and cause the person detained to be brought before the court or judge, according to the command of the writ; and shall likewise certify the true causes of his detainer or imprisonment, if any, or under what color or pretense such person is confined or restrained of his liberty.

"5. On any application for a *habeas corpus,* if it shall be made to appear to the satisfaction of the court or judge that there is probable cause for believing that the person who may be charged with confining or detaining the person making the application, or on whose behalf the same is made, is about to remove the person so detained from the place where he may then be confined or detained, for the purpose of evading any writ of *habeas corpus,* or for other purpose, or that the person charged as aforesaid would evade or not obey any such writ, then the court or judge shall insert in the writ of *habeas corpus* a clause commanding the sheriff of the county in which the person charged as aforesaid may be, to serve the writ on the person to whom the same may be directed, and to cause the said person immediately to be and appear before the said court or judge, together with the person so confined or detained.

"6. It shall be the duty of the sheriff to whom the writ mentioned in the preceding section may be delivered immediately to execute the same and to carry the person charged with the detention, together with the person detained, before the court or judge, who shall proceed to inquire into the subject-matter.

* * * * * *

"9. Any person committed or detained, or any person in his behalf, may demand a true copy of the warrant of commitment or detainer; and any officer or other person who shall neglect or refuse to deliver a true copy of the warrant of commitment or detainer, if any there be, within six hours after the same shall have been demanded, shall forfeit to the person detained five hundred dollars. The right of action to recover which or to recover the forfeiture in the next preceding section shall not cease by the death of either or both of the parties.

"10. On the return of a writ of *habeas corpus,* and producing the person detained and the cause of detention before the court or judge who granted the writ, the court or judge shall immediately inquire into the legality and propriety of such confinement or detention, and if it shall appear that such person is detained without legal warrant or authority he shall immediately be released or discharged, or if the court or judge shall deem his detention to be lawful and proper he shall be remanded to the same custody, or admitted to bail if his offense be bailable, and if bailed the court or judge shall take a recognizance to answer in the proper court and shall transmit the same to such court.

"11. Any person at whose instance or in whose behalf a writ of *habeas corpus* has been issued may controvert by himself or his counsel the truth of the return thereto or may plead any matter by which it may appear that there is not a sufficient legal cause for his detention or confinement, and the court or judge, on the application of the party complaining or the officer or other person, making the return shall issue process for witnesses or writings returnable at a time and place to be named in such process, which shall be served and enforced in like manner as similar process from courts of law is served and enforced, but before issuing such process the court or judge shall be satisfied by affidavit or otherwise of the materiality of such testimony.

"12. If the court granting the said writ of *habeas corpus* shall not be in session at the return thereof or if the judge granting the said writ of *habeas corpus* shall be absent at the return thereof the said writ shall be returned before any court or judge which or who would originally have had power or jurisdiction to issue such writ under the provisions of sections 1 and 3 if application in the particular case had been originally made to such court or judge.

* * * * * *

"17. Whenever application shall be made for a writ of *habeas corpus* to inquire into the cause of detention of any person, who shall be confined in any penal institution in this State, it shall be the duty of the Judge granting said writ, upon fixing the time for hearing, to instruct the clerk of the court in which such judge shall then be sitting, to give such notice of the time and place of such hearing to the State's Attorney for the county or city from which such person shall have been committed to such penal institution as will enable such State's Attorney to attend such hearing on behalf of the State."

RULES OF THE COURT OF APPEALS OF MARYLAND.

Rule 25, Sec. 1. In criminal cases an appeal or writ of error allowed by law shall be taken within ten days from the date of the judgment or sentence.

IV.

STATEMENT OF THE CASE.

This case presents the simple question of whether the Fourteenth Amendment to the Constitution of the United States requires the appointment of counsel to represent indigent persons accused of crime in State courts.

The petitioner filed a petition for a writ of *habeas corpus,* raising the above question before the Honorable Carroll T. Bond, a Judge of the State of Maryland, being a Judge of

the Court of Appeals of Maryland from the City of Baltimore (R. 1). Judge Bond decided that question adversely to the petitioner and ordered the petitioner to be remanded to the custody of the Warden of the Maryland State Penitentiary. The case is now before this Court to review that order.

On May 9, 1939, the petitioner was presented and indicted for robbery in the Circuit Court for Carroll County, Maryland. On May 12, 1939, he was arraigned and pleaded "not guilty" (R. 8). The petitioner was arraigned before Judge William H. Forsythe and at that time the petitioner advised the court that he could not afford counsel to represent him and he requested that counsel be appointed for him (R. 6, 7). Judge Forsythe advised the petitioner that he would not appoint counsel for him in his case because it was the practice in Carroll County to appoint counsel for indigent defendants only in cases of murder and rape (R. 7). The petitioner was unable to employ counsel (R. 30) due to lack of funds, and no counsel was appointed for him by the court.

On May 17, 1939, the petitioner's case was called for trial. He elected to be tried by the court without a jury. On the same day there was a verdict of guilty, judgment, and a sentence that the petitioner be confined to the Maryland State Penitentiary for a period of eight years (R. 8). At no time during the proceeding did the petitioner waive his right to counsel.

The petitioner, on June 5, 1941, *in propria persona,* filed a petition for a writ of *habeas corpus* before the Honorable Joseph D. Mish, a Judge of the State of Maryland, raising the same question later raised before Judge Bond (R. 26). The writ was granted the same day. After a hearing the petitioner's contention was rejected and he was remanded to the custody of the warden (R. 25).

On August 29, 1941, and while serving the said term, the petitioner filed a second petition for a writ of *habeas corpus*. It was filed before the Honorable Carroll T. Bond, a Judge of the State of Maryland, and stated that the petitioner was being illegally detained in the Maryland State Penitentiary because his commitment was based upon a void and illegal judgment in that it was obtained in a manner contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States as the petitioner had been denied the appointment of counsel (R. 1, 2). An answer was filed with Judge Bond by the warden of the penitentiary (R. 4).

On September 26, 1941, a full hearing was held before Judge Bond, testimony was taken, an agreed statement or stipulation of facts was filed, and counsel argued the case (R. 6, 7).

On October 6, 1941, Judge Bond filed his opinion in the case (R. 26) and signed an order which granted the writ but denied the petitioner his release and remanded him to the custody of the respondent (R. 31).

A petition for a writ of certiorari to the Honorable Carroll T. Bond, a Judge of the State of Maryland, being a Judge of the Court of Appeals of Maryland from the City of Baltimore, was filed in this Court on January 3, 1942, and said petition was granted by this Court on February 16, 1942 (R. 32).

V.

SPECIFICATIONS OF ERROR.

1. Judge Bond erred in failing to hold that the judgment entered by the Circuit Court for Carroll County was wholly void because of the refusal of the court to appoint counsel for the petitioner at his request.

2. Judge Bond erred in failing to hold that the petitioner was entitled to be released from the custody of the respondent because held under a commitment issued on a judgment obtained in violation of the guaranty of due process of law contained in the Fourteenth Amendment to the Constitution of the United States.

VI.

SUMMARY OF ARGUMENT.

Point A. This Court has jurisdiction to review the order of Judge Bond in accordince with the provisions of Section 237(b) of the Judicial Code as amended.

1. The decision below is that of a "court" within the meaning of Section 237(b) of the Judicial Code. Judge Bond was sitting as a "court" within the meaning of Section 237(b) of the Judicial Code because he sat as a judicial tribunal, followed judicial procedure fixed by statute, was bound to adjudge the rights of parties in accordance with law and had the power to and did enter a final judgment or decree.

2. The remedies afforded the petitioner by the State of Maryland have been exhausted. The time to appeal from the judgment of conviction has expired, and no review can be had in the State of Maryland of the decision of Judge Bond.

Point B. The Fourteenth Amendment requires the appointment of counsel to represent indigent persons accused of crimes in State courts.

The Fourteenth Amendment provides that a person shall not be deprived of his liberty without due process of law, and a necessary component of due process of law in a criminal trial is the right of an indigent prisoner to have counsel appointed to advise and represent him if he so desires.

Point C. A prisoner for whom counsel has not been appointed at his request is entitled to his release under a petition for a writ of habeas corpus.

Where a State court has failed to appoint counsel upon an indigent prisoner's request, it has no further jurisdiction to proceed with the trial. Any conviction or sentence resulting therefrom is void, and any commitment is illegal. Any prisoner so illegally detained should be released on his petition for a writ of *habeas corpus*.

ARGUMENT.

POINT A.

THIS COURT HAS JURISDICTION TO REVIEW THE ORDER OF JUDGE BOND IN ACCORDANCE WITH THE PROVISIONS OF SECTION 237(b) OF THE JUDICIAL CODE AS AMENDED.

1. The decision below is that of a court within the meaning of section 237(b) of the Judicial Code.

It is provided in Section 237(b) of the Judicial Code that it shall be competent for this Court by certiorari to review any final judgment or decree "rendered or passed by the highest Court of a State in which a decision could be had . . . where any title, right, privilege, or immunity, specially set up or claimed by either party under the Constitution . . . of . . . the United States . . . is denied." It is submitted that the decision of Judge Bond was the decision of a court within the meaning of that section.

This Court has held that the words "court" and "judge" may be used interchangeably in statutes. In *The United States, Petitioner*, 194 U.S. 194, in which Section 13, of the Chinese Exclusion Act of 1888, 25 Stat. 476, c. 1015, was under consideration, it was held that the appeal allowed by Section 13 from the decision of a commissioner "to the judge of the District Court for the district" meant an appeal to the District Court.

In *Craig v. Hecht,* 263 U.S. 255, the jurisdiction of the Circuit Court of Appeals to hear an appeal from the order of a district judge in a *habeas corpus* case was sustained, where the statute involved (Section 4 of the Judiciary Act of March, 1891) read:

> ". . . No appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeal, by writ of error or otherwise, from said district courts, shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established . . . "

In both of these cases this court held that the intent of Congress was to use the word "court" interchangeably with the word "judge" and to hold otherwise would defeat the purpose of the statutes involved.

Certainly the purpose of Section 237(b) of the Judicial Code is to give this Court jurisdiction to review the judgments or decrees of the highest judicial tribunals of each State where federal constitutional questions have been finally decided.

The material wording involved in Section 237(b) dates back to the original Judiciary Act of 1789. The intent of Congress to create this Court, and to confer jurisdiction thereon in order to carry out the mandate of Article III, Section 2 of the Constitution of the United States is clearly and fully discussed in *Martin v. Hunter's Lessee,* 1 Wheat. 304. In particular it was there held that under the Constitution the appellate power of this Court extends to *all* cases arising under the Constitution. "It is the case, then, and not the court, that gives the jurisdiction" (p. 338).

Furthermore it was held at page 331 that:

> ". . . the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority."

It was to carry out the Constitutional mandate that the original Judiciary Act of 1789 was passed and by which there was conferred on this Court appellate jurisdiction in certain classes of cases including final judgments and decrees in any suit in the highest court of a State in which a decision could be had and in which a question arising under the Federal Constitution had been decided.

Certainly with that purpose to be carried out it would seem improbable that Congress in passing the Judiciary Act of 1789 meant to leave out of the appellate jurisdiction of this Court decisions of State judges when acting as the highest judicial tribunals of the State but not called by the name "court." And if it be held that the word "court" as used in the Judiciary Act of 1789 included "judge," then the same construction would apply to Section 237(b), because the identical phrase "highest court of a State" is used in every subsequent Judiciary Act.

The doubt that the decision of Judge Bond is that of a court within the meaning of Section 237(b) of the Judicial Code is raised by the line of cases beginning with *McKnight v. James,* 155 U. S. 685. In construing a similar provision of an earlier Judicial Code, it was held in these cases that the Supreme Court of the United States lacked jurisdiction to grant a writ of error to a judge in chambers, because a judge in chambers was not a "court" within the meaning of the Code.

In *McKnight v. James, supra,* a petition for a writ of *habeas corpus* was filed with a judge in chambers of a lower Ohio court. Upon being remanded the petitioner sought to have a writ of error issue from this Court to that judge, contending that this Court had jurisdiction under Rev. Stat., Sec. 709, to issue a writ to the judge in chambers.

But the contention of the petitioner in *McKnight v. James* was fatally inconsistent. He insisted that for the purposes of the Ohio State law a judge in chambers was not a court and therefore the judge's decision was not reviewable by the highest court of Ohio. On the other hand he contended that for the purposes of Section 709 of the Revised Statutes the judge in chambers was a court and therefore, that this Court had jurisdiction to review the judge's order on a writ of error. The fallacy of such a position was obvious and this Court properly declined to hear his case.

There was a further objection to the acceptance of jurisdiction in that case, namely, the petitioner had addressed his petition for a writ of *habeas corpus* to a judge in chambers for the apparent purpose of avoiding a review thereof by that State's highest court.

The holding of the *McKnight* case, and the cases following it, is explained in *Craig v. Hecht,* 263 U. S. 255, at page 276, where it is said:

> "The . . . cases go no further than to hold that appeals do not lie to this Court from orders by judges at chambers."

This, it is submitted, is sound. But, the contention here made is that the order of Judge Bond was not the order of a judge at chambers.

In the present case, Judge Bond had all the attributes of a court. His order was final, i.e. he could make a decision, *Ableman v. Booth,* 21 How. 506; *Bryant v. Zimmerman,* 278 U. S. 63. The ability of a judicial tribunal to make a decision was considered as one of the elementary characteristics of a "court" in *Olney v. Arnold,* 3 Dall. 308, in which this Court decided that the General Assembly of Rhode Island was not a court within the meaning of the Judiciary

Act of 1789 because, although it could set aside, it could not make, a decision.

The power to issue the writ of *habeas corpus* as a conservator of the peace was conferred on Judge Bond by Art. 4, Sec. 6, of the State Constitution. *Sevinskey v. Wagus,* 76 Md. 335, 336. But the procedure which Judge Bond was bound to follow is prescribed by Article 42 of the PUBLIC GENERAL LAWS OF MARYLAND (Flack's 1939 Ed. as amended by the Laws of Maryland, 1941, c. 484), the pertinent provisions of which appear above at pages 3 to 6.

That procedure, fixed by statute, is adversary and requires due notice by service of process on the opposing party, opportunity to file an answer, the right to subpoena witnesses, to take testimony and to be heard on the law. It finally requires an adjudication. It is of particular significance that the procedure which Judge Bond, sitting as a judge, must follow, is identical under the Maryland practice with the procedure which a court must follow.

Accordingly, therefore, Judge Bond, in the present case, filled all of the requirements of a court, and fulfilling all such requirements in making his decision, that decision should be held to be one of a court within the meaning of Sec. 237(b).

2. The remedies afforded the petitioner by the State of Maryland have been exhausted.

The petitioner contends that his State remedies have been exhausted. The ten days allowed for taking an appeal from his original conviction have long since elapsed, see Rule 25 of the Rules of the Court of Appeals of Maryland at page 6 hereof.

Furthermore, the decision of Judge Bond could not be appealed, *Petition of Otho Jones,* 179 Md. 240, 16 A. (2d) 901; *State v. Glenn,* 54 Md. 572; *Annapolis v. Howard,* 80 Md. 244, 30 Atl. 910; *Ex Parte O'Neill,* 8 Md. 227; nor could

the Court of Appeals of Maryland have issued a writ of *habeas corpus. Sevinskey v. Wagus,* 76 Md. 335, 25 Atl. 468; see *Hendrick v. State,* 115 Md. 552, 81 Atl. 18.

It is true that the petitioner could have applied for successive writs with every judge and court in the State, and even with the same judges over and over again, raising the same point in each petition, *State v. Glenn, supra; Bell v. State,* 4 Gill 301, 304, and see Judge Bond's opinion (R. 26). But it would exhaust both the petitioner and the respondent to do so and would accomplish no purpose other than an harassment of the judiciary. Furthermore, there could be no appeal in Maryland from any other judge *or* court, see cases *supra.*

It appears from the record in this case that the judges and courts of Carroll County would decide adversely to the petitioner's contention (R. 7). Also the petitioner had already presented the same point to Judge Mish in Washington County and he had ruled adversely thereon (R. 25, 26).

The records in *Gall v. Brady* (D. Md.), 125 F. (2d) 253, 39 F. Supp. 504, and *Carey v. Brady* (D. Md.), 125 F. (2d) 253, 39 F. Supp. 515, which are now before this Court on petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit, being Nos. 937 & 938, October Term 1941, show that other Maryland State judges and courts have rejected the proposition that counsel must be appointed for indigent prisoners.

It is submitted therefore that all State remedies have been exhausted. In fact, the federal district court in Maryland in the *Gall* and *Carey* cases, *supra,* has come to the same conclusion, which decisions were affirmed by the Circuit Court of Appeals for the Fourth Circuit in *Carey v. Brady,* 125 F. (2d) 253. Thus, no further relief can be granted this petitioner except in this Court.

POINT B.

THE FOURTEENTH AMENDMENT REQUIRES THE APPOINTMENT OF COUNSEL TO REPRESENT INDIGENT PERSONS ACCUSED OF CRIMES IN STATE COURTS.

This Court has held that the Sixth Amendment to the Constitution of the United States requires the appointment of competent counsel to represent indigent prisoners in federal courts, regardless of the nature of the alleged crime. *Walker v. Johnston,* 312 U. S. 275; *Johnson v. Zerbst,* 304 U. S. 458. Even an attorney who has had considerable experience in criminal courts as an assistant United States attorney is entitled to the services of separate counsel to represent him alone. *Glasser v. United States,* — U. S. —, 86 L. Ed. 405, 62 S. Ct. 457.

It is respectfully submitted that a similar protection is afforded indigent prisoners in State courts through the protective provisions of the Fourteenth Amendment. This conclusion is based upon several decisions of this Court following the case of *Powell v. Alabama,* 287 U. S. 45, in which it was held that the right of a prisoner in a State court, at least in a capital case, to have counsel appointed for him by the court is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment.

In *Avery v. Alabama,* 308 U. S. 444, Mr. Justice BLACK speaking for this Court in a case involving the question of the appointment of counsel by a State court in a capital case, and citing the *Powell* case, said at page 445:

> "Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required a reversal of his conviction."

Other decisions of this Court have indicated that this very protection of the Sixth Amendment to prisoners on trial in federal courts is extended through the provisions of the Fourteenth Amendment to prisoners on trial in State courts. *Grosjean v. American Press Co.*, 297 U. S. 233, 243, 244; *Palko v. Connecticut*, 302 U. S. 319, 324; *Johnson v. Zerbst*, 304 U. S. 458, 463. See also *Boyd v. O'Grady*, (CCA 8), 121 F. (2d) 146, 148; *Ex Parte Murphy* (E. D. Wis.), 35 F. Supp. 473, 474.

It is true that the Fourteenth Amendment does not contain the specific words contained in the Sixth Amendment that a prisoner is entitled "to have the Assistance of Counsel for his defense." However, it has been held by this Court that many of the rights protected against federal invasion by specific provisions of the bill of rights have been equally protected against State invasion by the general terms "due process of law" of the Fourteenth Amendment. After illustrating how certain provisions of the original bill of rights are not extended through the Fourteenth Amendment as prohibitions on State activity, Mr. Justice CARDOZO in *Palko v. Connecticut*, 302 U. S. 319, said at page 324:

> "On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress . . .; or the like freedom of the press . . .; or the free exercise of religion . . .; or the right of peaceable assembly, without which speech would be unduly trammeled . . .; *or the right of one accused of crime to the benefit of counsel, Powell v. Alabama*, 287 U. S. 45. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the

> concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." (Emphasis supplied.)

Likewise, in *Grosjean v. American Press Co.*, 297 U. S. 233, this Court, speaking through Mr. Justice SUTHERLAND, said at page 243 in referring to its decision in *Powell v. Alabama, supra:*

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, *and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.*" (Italics supplied.)

The most recent decision of this Court dealing with the appointment of counsel in State courts is *Smith v. O'Grady,* 312 U. S. 329, in which the petitioner claimed that he was entitled to his release on a petition for a writ of *habeas corpus* because he had been denied due process of law in his trial on a charge of burglary with explosives, in a criminal court of the State of Nebraska. In reversing the Supreme Court of the State of Nebraska, this Court, speaking through Mr. Justice BLACK, reviewed the claims of the petitioner, including "that his request for the benefit and advice of counsel had been denied by the court", and said at page 334:

> "If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guarantees protected against state invasion through the Fourteenth Amendment."

As authority for the above quotation this Court referred to *Walker v. Johnston,* 312 U. S. 275, and *Johnson v. Zerbst,* 304 U. S. 458, the two leading cases to the effect that the Sixth Amendment secures to prisoners in federal courts

the appointment of counsel, regardless of the nature of the charge. The inference that the Sixth and Fourteenth Amendments extend this same protection in federal and State courts, respectively, is apparent.

The necessity of counsel to due process is not the result of any technical interpretation of constitutional language but is merely a conclusion drawn from the broad and humane general principles of law. This is clearly set forth in the opinion of the Court in *Johnson v. Zerbst, supra,* at page 463, as follows:

> "That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment *and other parts of our fundamental charter,* this Court has pointed to '. . . the humane policy of the modern criminal law . . . ' which now provides that a defendant ' . . . if he be poor . . . may have counsel furnished him by the State . . . not infrequently . . . more able than the attorney for the State.' " (Italics supplied.)

It has been argued that although this Court may be said to have extended the provisions of the Fourteenth Amendment to include the right to the appointment of counsel to prisoners in State courts, nevertheless this right is confined to cases involving the possibility of capital punishment only. Both *Powell v. Alabama, supra,* and *Avery v. Alabama, supra,* were capital cases. However, no such distinction was made in the case of *Smith v. O'Grady, supra,* where the charge involved, at most, imprisonment for a period of years. And certainly no such distinction is made in the application of the Sixth Amendment to the appointment of counsel in federal courts, *Johnson v. Zerbst,* 304 U. S. 458 (charge of possessing and uttering counterfeit money). For a decision of a State court see *Commonwealth v. Smith* (Pa. Super. Ct.), 11 A. (2d) 656.

In fact, in the most recent decision involving the appointment of counsel by the criminal courts of the State of Maryland, *Carey v. Brady,* 125 F. (2d) 253, a majority of the Circuit Court of Appeals for the Fourth Circuit held that the failure of the State courts to appoint counsel in cases of simple burglary amounted to a denial of due process of law although the charges involved, at most, possible sentences of imprisonment for a limited number of years.

It is respectfully submitted that there is no reasonable nor logical basis for any such distinction in view of the fact that the Fourteenth Amendment provides that a State shall not deprive any person of *life or liberty* without due process of law. The artistry, complexities and mysteries of judicial proceedings are no less where the prisoner faces imprisonment than where he faces death.

Of course, if the prisoner can afford to employ counsel there should be no obligation on the court to make an appointment, *Watkins v. Commonwealth,* 174 Va. 518, 6 S. E. (2d) 670; but where he is a pauper, and is admitted to be so, as in the case at bar, his need for the appointment of counsel, where he requests it, is apparent, if justice is to be done.

The basis upon which this Court has proceeded in its determination that the appointment of counsel is necessary to due process of law is clearly stated by the Court speaking through Mr. Justice SUTHERLAND in *Powell v. Alabama,* 287 U. S. 45, at pages 68 and 69, and quoted in full at page 463 of *Johnson v. Zerbst,* 304 U. S. 458, as follows:

> "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. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, gen-

> erally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Certainly such language does not admit of any difference in its application to trials in which capital offenses are involved rather than to those which may result merely in imprisonment, perhaps for life. Further, in *Johnson v. Zerbst, supra,* at page 462, this Court has said of the constitutional safeguards of the Sixth Amendment which in principle are identical to those of the Fourteenth Amendment insofar as the appointment of counsel is concerned:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his *life or liberty,* wherein the prosecution is presented by experienced and learned counsel." (Italics supplied.)

Judge Bond, in his opinion (R. 30), says that the petitioner was fairly tried. The only issue involved was the identity of the petitioner and the evidence clearly identified him. It is to be presumed that a reading of a record in any criminal case would normally support the finding of the trial court. But the presentation of a *prima facie* case does not undeniably prove a prisoner's guilt. The petitioner contends he was innocent. Had he been allowed the representation of some experienced person who would have

recognized and presented other facts of significance, but ignored by the prosecution, and who could have searchingly examined the identifying witnesses, perhaps the record might have been different. Nor can the trial judge adequately protect a prisoner's interests, regardless of the highest motives and most sincere efforts. *Powell v. Alabama*, 287 U. S. 45, 61.

POINT C.

THE FAILURE OF THE COURT TO APPOINT COUNSEL DEPRIVED THE COURT OF ITS JURISDICTION AND RENDERED ITS SENTENCE AND CONVICTION VOID.

It has been held by this Court that the denial to a prisoner of the due process of law secured to him by the provisions of the Fourteenth Amendment, destroys the jurisdiction of the trial court and renders void a judgment of conviction and sentence based thereon. *Brown v. Mississippi*, 297 U. S. 278, 287; *Chambers v. Florida*, 309 U. S. 227. It has likewise been repeatedly held that as a consequence of such a denial of due process a prisoner so committed is entitled to his release on a petition for a writ of *habeas corpus*. *Frank v. Mangum*, 237 U. S. 309; *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103; *Smith v. O'Grady*, 312 U. S. 329.

In *Boyd v. O'Grady*, 121 F. (2d) 146, the Circuit Court of Appeals for the Eighth Circuit specifically held that "the procedural guaranty of the Sixth Amendment of the Federal Constitution is protected against State invasion through the Fourteenth Amendment," and, therefore, that if a prisoner in a State court is denied the appointment of counsel, he is entitled to his release on petition for *habeas corpus*.

It is true that a majority of the Circuit Court of Appeals for the Fourth Circuit recently held in *Carey v. Brady*, 125

F. (2d) 253, that, although the failure of a State court to appoint counsel is a denial of due process, nevertheless, it does not destroy the jurisdiction of the trial court but is merely error which can be taken advantage of only on appeal. However, it is respectfully submitted that not only is such a conclusion directly contrary to the unanimous holdings of the above cases, but if that should be the law, there would be, as a practical matter, no substantial constitutional protection for an indigent prisoner.

The petitioner could have taken an appeal from his judgment of conviction, but Rule 25 of the Rules of the Court of Appeals of Maryland (see page 6 hereof) provides that such appeal must be taken "within ten days from the date of the judgment or sentence." As the petitioner had been unable to obtain counsel, because of lack of funds, from the time of his apprehension until the date of his trial, it is hardly probable that within the permissible period succeeding his conviction any change of circumstances would occur; and without counsel he would neither realize that he could take advantage of the error nor know how to proceed.

In specifically approving the writ of *habeas corpus* as a method of correcting the error of a federal court in failing to appoint counsel for an indigent prisoner this Court said in *Johnson v. Zerbst,* 304 U. S. 458, at page 465:

> "True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human *life and liberty.*" (Emphasis supplied.)

CONCLUSION.

It is therefore respectfully submitted that the order of the Honorable Carroll T. Bond, a Judge of the State of Maryland, being a Judge of the Court of Appeals of Maryland from the City of Baltimore, should be reversed and that the petitioner should be granted his release on his petition for a writ of *habeas corpus*.

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